Supreme Court of the State of New York
Appellate Division: Second Judicial Department

GRIEVANCE COMMITTEE COMPLAINT FORM

Date: 03-March-2017

COMPLAINANT INFORMATION

Your Name: (Mr.)(✓) (Ms.)( ) Flores (Last) Louis (First) (Initial)

Address: 34-21 77th Street (Street) 406 (Apt. #)

Jackson Heights (City) Queens (County) NY (State) 11372 (Zip Code)

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ATTORNEY COMPLAINED OF:

Name: Singh (Last) Rukhsanah (First) L. (Initial)

Office Address: 271 Cadman Plaza East (Street)

Brooklyn (City) Kings (County) NY (State) 11201 (Zip Code)

Telephone: (718) 254-7000

CONTACT WITH OTHER AGENCIES

Have you contacted any other agency, such as a Bar Association or District Attorney's Office, concerning this matter? No

If so, state the name of the agency: N/A

What action was taken by the agency? N/A

COURT ACTION TAKEN BY YOU AGAINST THE ATTORNEY

Have you taken any civil or criminal action against the attorney? No, but the misconduct

If so, please name the court and provide the index number: USDC EDNY was brought to the attention

What action was taken by the court? NONE!! 15-CV-2627. of the Judge.

ALLEGATIONS

Explain your complaint against the attorney in as much detail as possible. When did you retain the attorney? How much did you pay? What legal services did the attorney agree to perform for you? What did the attorney actually do for you? What conduct did the attorney commit that you believe is improper? Send this office COPIES of all documents that you believe support your claim, with the names and addresses of any witnesses. (Please use a pen with black ink. If necessary, continue your narrative on a separate sheet of paper.)

Rukhsanah Singh entered into evidence an exhibit that was altered to remove any indication that an attachment was included in the email. See PL Exhibit JJ, Gov't Exh. F, and PL. Motion at 34. Because the Judge showed bias in favour of the DOJ and the DOJ's documents and exhibits, Rukhsanah Singh's entry of an altered exhibit, which was a key document for Plaintiff's case for sanctions against the DOJ, was detrimental to Plaintiff's case — and it misled the Court. Additionally, Rukhsanah Singh allowed misrepresentations to be entered into the Court's record, such as improbable statements that an Assistant U.S. Attorney would not have a copy of the U.S. Attorneys' Manual. As an officer of the Court, Rukhsanah Singh had a duty not to alter or destroy evidence and to disclose information and/or conditions to a Court, whether or not the facts are adverse to the attorney. Because these violations undermined the integrity of the Court's proceedings, these violations constitute second degree obstruction of government administration under New York Penal Law. See N.Y. Pen. Law § 195.05.

03 MAR 2017

Please Sign Here

Note: Unsigned complaints and those sent by e-mail or fax transmission will not be processed.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

LOUIS FLORES, *Plaintiff*, v. UNITED STATES DEPARTMENT OF JUSTICE, *Defendant*.	15-CV-2627 (JG)(RLM)

MEMORANDUM IN SUPORT OF PLAINTIFF'S CROSS MOTION
UNDER RULE 52 AND DEMAND FOR SANCTIONS AND PENALTIES

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INTRODUCTION

This action was brought by Plaintiff Louis Flores ("Plaintiff" of "Flores") against Defendant United States Department of Justice ("DOJ" or the "Government") to compel compliance with the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA") and the First Amendment, U.S. Const. amend. I., for injunctive and other appropriate relief, seeking the immediate processing and release of agency records requested by Plaintiff pursuant to a FOIA request, dated 30 April 2013 (the "First FOIA Request"). During proceedings before this Court, Plaintiff filed another FOIA request, dated 20 October 2015 (the "Second FOIA Request," and, collectively with the First FOIA Request, the "Free Speech FOIA Requests").

BACKGROUND

This action has sought under FOIA and the First Amendment the expedited processing and release of DOJ agency records regarding the Government's prosecution of activists, including of Lt. Daniel Choi, an international civil rights activist, who was discharged from the U.S. armed services under the military's former discriminatory policy, "Don't Ask, Don't Tell" ("Lt. Choi"). (Dkt. No. 1). The First FOIA Request was sent by Plaintiff to an address provided by the DOJ by Certified Mail – Return Receipt Requested. (Dkt. No. 12 at Ex. D to Ex. I to Ex. C). The First FOIA Request was physically received and signed for by an agent of the DOJ on 06 May 2013. (Dkt. No. 12 at Ex. II to Ex. C). (Flores Decl., Ex. OO). As a courtesy, Plaintiff e-mailed the First FOIA Request to DOJ officials on 30 April 2013. (Flores Decl., Ex. JJ). On 01 May 2013, a DOJ official acknowledged receipt by return e-mail to Plaintiff of Plaintiff's 30 April 2013 e-mail transmitting the First FOIA Request. (Flores Decl., Ex. RR). The First FOIA Request listed eighteen (18) requests in four categories : (i) "All records and information pertaining to the legal basis of prosecuting activists, who engage in protests" ; (ii) "All records and information created on or after Nov. 12, 2010, pertaining to the legal basis for the arrest and/or prosecution of Lt. Choi" ; (iii) "All records and information created on or after Nov. 12, 2010, pertaining to the legal basis for the Department of Justice or

U.S. Attorney's Office to fail to refer to Lt. Choi by his military rank, in accordance with Army Regulation 670-1" ; and (iv) "The total cost of the prosecution of Lt. Choi" (Dkt. No. 12, Ex. A to Ex. I of Ex. C). (PL 56.1 Answer ¶ 8). In violation of the FOIA and its own regulations, including the President's FOIA Memorandum and the Attorney General's FOIA Guidelines, the DOJ failed to process Plaintiff's First FOIA Request on an expedited basis, or within ten (10) calendar days, as was requested. *See* 5 U.S.C. § 552(a)(6)(E)(ii)(I) ; 22 C.F.R. § 171.12(b) ; 28 C.F.R. § 16.5(d)(4) ; 32 C.F.R. § 286.4(d)(3) ; 32 C.F.R. § 1900.21(d). The DOJ didn't even process the First FOIA Request within the twenty (20) business-day time frame for processing a standard FOIA request not entitled to expedited treatment. (Flores Decl., Ex. A at 2-3).

Before the commencement of this action, Plaintiff made many attempts to pressure the DOJ to comply with FOIA and answer the First FOIA Request. Plaintiff's attempted to negotiate with Government officials Sanjay Sola ("Sola") and Sonya Whitaker ("Whitaker") for the release of responsive records under Request No. 13-1506. (PL 56.1 Answer ¶¶ 11a-b, 13, 17b). Plaintiff launched an activist campaign that included a letter writing campaign that featured the Hon. United States Representative Joseph Crowley asking the DOJ to process Plaintiff's First FOIA Request (the "Congressional Request"). (Dkt. No. 12, Ex. I to Ex. D). (Flores Decl., Ex. B). (PL 56.1 Answer ¶¶ 16b-c). For a period of time, Plaintiff was represented by counsel, Willkie Farr & Gallagher LLP ("Plaintiff's Counsel"), which filed an appeal with the Office of Information Policy (the "OIP") (Appeal No. AP-2014-00890) (the "FOIA Appeal"). (Flores Decl., Ex. A at 2). (PL 56.1 Answer ¶ 16). As a result of the FOIA Appeal, the OIP remanded to the Executive Office for United States Attorneys (the "EOUSA") an instruction to reopen the request file and process the First FOIA Request (the "OIP Remand Memo"). (Flores Decl., Ex. A at 3). According to the OIP Remand Memo, the EOUSA claimed that it could not locate the request file for the First FOIA Request. (Flores Decl., Ex. A at 3). When Plaintiff's Counsel submitted the FOIA Appeal, the FOIA Appeal indicated that a copy of the First FOIA Request was enclosed : "(the "Request")

(Enclosed)." (Flores Decl., Ex. A at 2).[1] The DOJ never asked one of the lawyers, who was handling the FOIA Appeal at Plaintiff's Counsel, for a replacement copy of the First FOIA Request. (Flores Decl., Ex. NN). After the DOJ never produced any records in response to the FOIA Appeal, Plaintiff produced YouTube videos as part of his activism campaign, and the YouTube videos were disseminated over social media, primarily over Twitter.[2] (PL 56.1 Answer ¶ 99). In furtherance of Plaintiff's activism campaign, Plaintiff even protested in front of former United States Attorney General Eric Holder ("Holder"), asking that the DOJ process Plaintiff's First FOIA Request.[3] (PL 56.1 Answer ¶ 99).

After Plaintiff commenced this action, Defendant filed an Answer, indicating that Assistant U.S. Attorney Angela George ("George") had a copy of the First FOIA Request all along. (Dkt. Nos. 9 ¶ 29, 17 ¶ 29). (Flores Decl., Ex. JJ). (PL 56.1 Answer ¶ 91). Despite that George and other officials at the DOJ had copies of the First FOIA Request all along, Plaintiff provided to Assistant U.S. Attorney Rukhsanah Singh ("Defense Counsel") another copy of the First FOIA Request by cover letter dated 05 July 2015. (Dkt. No. 12, Ex. I of Ex. C). On 31 July 2015, Plaintiff and Defense Counsel participated in a Telephone Conference during which Defense Counsel informed

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1 Although, in Plaintiff's copy of the e-mail, it does not appear that the First FOIA Request was attached, Plaintiff notes that one of the lawyers at Plaintiff's Counsel was never asked to provide a copy of the First FOIA Request. (Flores Decl., Ex. NN).

2 *See, e.g.*, Louis Flores, Twitter (Oct. 15, 2013, 4:42 PM EST), https://twitter.com/maslowsneeds/status/390216209636925440 (attaching a link to a YouTube video, which had been uploaded on Oct. 15, 2013, that explored whether individuals outside the DOJ had a role in ordering the arrest of Lt. Choi for his activism and questioned whether the DOJ was targeting for vindictive prosecution activists, who may have been engaged in pressure politics against the President in order to bring about social change) ; Louis Flores, Twitter (Feb. 25, 2014, 4:24 PM EST), https://twitter.com/maslowsneeds/status/438424392977375232 (attaching a link to another YouTube video, which had been uploaded on Dec. 4, 2013, noting that speech critical of government, for example, political speech, is a freedom guaranteed as a protection in the First Amendment to the U.S. Constitution, adding that when the DOJ does not honor FOIA requests, this failure acts to curtail free speech, because the failure denies citizens information about the government's conduct, consequently preventing citizens from meaningfully forming informed speech, from meaningfully assembling to discuss the government's conduct, and to petition their government for a redress of grievances).

3 *See* Louis Flores, Twitter (Sept. 25, 2014, 11:15 AM EST), https://twitter.com/maslowsneeds/status/515157736821358592 (noting the Sept. 17, 2014, protest against Holder).

Plaintiff that the DOJ was preparing a response to the First FOIA Request and that the DOJ was planning to file a motion for summary judgment as soon as it answered the First FOIA Request. (PL 56.1 Answer ¶ 59a). By cover letter dated 19 August 2015, the EOUSA produced records in response to the First FOIA Request (the "First FOIA Response" or "Red Herring Response"). (Flores Decl., Ex. F).

After Plaintiff received the First FOIA Response, Plaintiff began to review the First FOIA Response and sent a letter to Defense Counsel dated 26 August 2015, objecting to the First FOIA Response, claiming that the DOJ had intentionally created a red herring by providing incomplete pleadings in the Government's trial against Lt. Choi, an "indication of the DOJ acting in bad faith." (Dkt. No. 12 at Ex. A). Plaintiff and Defense Counsel participated in a Telephone Conference on 01 September 2015, at which time Plaintiff reiterated his objection to the Red Herring Response, noting that Plaintiff was in the middle of completing an index of the First FOIA Response ("Plaintiff's Index to the First FOIA Response") and that Plaintiff was noting many missing documents from the Red Herring Response. (PL 56.1 Answer ¶ 8.1b(iii)(A)). (Dkt. No. 12 at Ex. B). Defense Counsel offered to provide a copy of one of the missing documents, but Plaintiff objected to receiving the one missing document (referred to as "Tab J"), because Defense Counsel said that Plaintiff would have to obtain the rest of the missing records at his time and expense from PACER. (PL 56.1 Answer ¶ 65). (Dkt. No. 12 at 1 and Ex. B). Defense Counsel informed Plaintiff that the Government had made the Red Herring Response at its discretion, which was later represented in documents submitted to the Court. (Stone Decl., ¶ 8).

Plaintiff objected to Defense Counsel's wrongful assertion that Plaintiff would have to collect the documents missing from the Red Herring Response from PACER. (Dkt. No. 12 at 1). Plaintiff then wrote a letter to the Court, amongst other reasons, asking to conduct discovery, because there had not been an adequate search for records

("Plaintiff's Letter Motion for Discovery). (Dkt. No. 12 at 2, Ex. B).[4] In Plaintiff's Letter Motion for Discovery, Plaintiff noted in Plaintiff's Index to the First FOIA Request that there were references to the kinds of records that Plaintiff had been seeking, but that the DOJ had intentionally withheld. (Dkt. No. 12 at Ex. B). Plaintiff noted for the Court that the DOJ's intention was to "divert attention away from the true documents and records being sought" under the First FOIA Request. (Dkt. No. 12 at 1).

The first sub-item under request 1 of the First FOIA Request asked for records that would identify : "what kind of activists may be targeted for prosecution, how many activists have been targeted for prosecution, what are the names of such activists, and which Department of Justice officials approved of such prosecution of activists." (Dkt. No. 12 at Ex. I to Ex. C). (PL 56.1 Answer ¶ 8a(i)). Since the DOJ had said it had not found any responsive records to the First FOIA Request, Plaintiff hoped that by providing examples of names of activists, who had been prosecuted for their activism, that it would make it easier for the DOJ to locate and produce these records. (PL 56.1 Answer ¶ 40). Before the Initial Conference between the Parties and the Hon. U.S. District Court Magistrate Judge Roanne Mann, Plaintiff performed due diligence and produced an index of the kinds of records that Plaintiff had been seeking ("Plaintiff's Index of References to Records Requested under FOIA Request"). (PL 56.1 Answer ¶ 40). At the Initial Conference, Plaintiff served Defense Counsel with a copy of Plaintiff's Index of References to Records Requested under FOIA Request. (PL 56.1 Answer ¶ 40).

At the Initial Conference and in the subsequent Omnibus Order, the Court recommended that the DOJ conduct searches for some of the records on Plaintiff's Index of References to Records Requested under FOIA Request. (Dkt. No. 12). At the Initial Conference, Plaintiff objected to acts of bad faith committed by the DOJ and requested the Court's permission to amend the Complaint to include demands for sanctions and

[4] Under FOIA, discovery is appropriate when an agency has not undertaken an adequate search for records. *Schrecker v. Dep't of Justice*, 217 F. Supp. 2d 29, 35 (D.D.C. 2002), *aff'd* 349 F.3d 657 (D.C. Cir. 2003).

penalties. (PL 56.1 Answer ¶ 40.1). (Dkt. No. 12). The Court granted Plaintiff's request to amend the Complaint. (Dkt. No. 14 at 1). On 23 September 2015, Plaintiff filed an Amended Complaint, demanding that the Court "appoint a monitor to conduct or verify the search for responsive records, order the conduct of in camera reviews of records, and/or impose sanctions and penalties, including fines, against the Defendant to compel compliance with FOIA and to deter each of future acts of bad faith and future violations of FOIA." (Dkt. 15 at 30).

On 16 October 2015, Plaintiff and Defense Counsel participated in another Telephone Conference to discuss the DOJ's forthcoming response to Plaintiff's Index of References to Records Requested under FOIA Request, as promised by a cover letter, dated 13 October 2015, from Defense Counsel to Plaintiff (the "Second FOIA Response"). (Flores Decl., Ex. G). (PL 56.1 Answer ¶ 22). To stall for time, Defense Counsel had e-mailed the cover letter for the Second FOIA Response without attaching the responsive documents. (PL 56.1 Answer ¶ 71). Although Plaintiff had not yet received the records constituting the Second FOIA Response, the Parties attempted to discuss the outstanding records without Plaintiff having the benefit of reviewing any responsive documents or Declarations. (PL 56.1 Answer ¶ 65).

During the 16 October 2015 Telephone Conference, Plaintiff made objections to many issues, including to Defense Counsel's wrongful assertion that the DOJ can comply with FOIA at its discretion. (PL 56.1 Answer ¶ 65). Plaintiff renewed his objection to the bad faith act by the DOJ to produce the Red Herring Response and informed Defense Counsel that Plaintiff planned to request that the Court make a determination as to the DOJ's obligations under FOIA in respect of the documents missing from the Red Herring Response. (PL 56.1 Answer ¶ 65). Plaintiff asked Defense Counsel if any other components of the DOJ had a Criminal Division, where possible records responsive to the First FOIA Request could exist, and Defense Counsel answered in the negative. (PL 56.1 Answer ¶ 81). After the call was concluded, Plaintiff checked the DOJ's Web site and saw that the Civil Rights Division had a Criminal Division and that the Civil Rights Division is a component that "works to uphold the civil and constitutional rights of all

Americans, particularly some of the most vulnerable members of our society."[5] (PL 56.1 Answer ¶ 81). Because of each of the material misrepresentations made by Defense Counsel and the Government's pattern and practise of violating FOIA until the intervention by the Courts, Plaintiff had no choice but to prepare and file the Second FOIA Request in an effort to "close the loop" on the records being sought by Plaintiff. (PL 56.1 Answer ¶ 81). (Flores Decl., Attachment to Ex. I).

With *only seventeen (17) days* before the Parties were expected to file a Joint Status Report with the Court, Plaintiff received on 19 October 2015 from Defense Counsel the DOJ's Second FOIA Response. (Flores Decl., Ex. G). A "no records" letter, dated 15 October 2015 and signed by Defense Counsel, was provided to Plaintiff in lieu of responsive records at "Main Justice" (the "Third FOIA Response"). (Flores Decl., Ex. H). Amongst the documents included in the Second FOIA Response were copies of sections from the United States Attorneys' Manual applicable to "demonstrations." (Flores Decl., Ex. G at Tab D). *See U.S. Dep't of Justice*, United States Attorneys' Manual § 9-65.880, .881, .882. These records indicated that the DOJ can prosecute activists. The DOJ also produced other records from the United States Attorneys' Manual. (Flores Decl., Ex. G at Tabs E and G). Once Plaintiff received and reviewed the Second FOIA Response, Plaintiff performed due diligence and prepared a letter, dated 26 October 2015, that included several questions about the Second FOIA Response (the "Plaintiff's Due Diligence Letter"). (Flores Decl., Ex. I). The DOJ responded by letter, dated 03 November 2015, answering only two (2) questions presented by Plaintiff ("Defendant's Incomplete Due Diligence Response"). (Flores Decl., Ex. J). In keeping with the DOJ's pattern and practise of subverting FOIA, the DOJ objected to Plaintiff's right to conduct due diligence and would neither agree to provide to Plaintiff clarification about the few responsive records produced by the DOJ, to negotiate with Plaintiff for outstanding records, nor to an extension of time to negotiate. (Flores Decl., Ex. J). (Dkt. No. 18 at 3).

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[5] *See* Civil Rights Division, *About the Division*, U.S. Department of Justice (Sept. 22, 2015), http://www.justice.gov/crt/about-division.

Attempts by Plaintiff to resolve outstanding issues with the DOJ were cut short by the Memorandum and Order issued by the Court on 09 November 2015 (Dkt. No. 19). During Plaintiff's negotiations during this action, it became apparent that the DOJ was not acting in good faith and was making misrepresentations to Plaintiff, including producing suspect documents to Plaintiff or submitting suspect documents into evidence before this Court. Given issues about the credibility of the Defendant, Plaintiff therefore respectfully requests that the Court consider Rule 52(a)(6), Fed. R. Civ. P. 52(a)(6), setting aside some of its findings in each of its Omnibus Order, dated 16 September 2015 (denying Plaintiff's request to conduct discovery), and its Memorandum and Order, dated 09 November 2015 (implying Plaintiff was trying to expand this FOIA action), only to the extent to allow Plaintiff to respectfully request that the Court enter an order compelling the DOJ to answer the Free Speech FOIA Requests and to enter an order imposing sanctions and penalties on the Defendant, as set forth below.

ARGUMENT

I. FOIA

FOIA was signed into law by President Lyndon Johnson on July 4, 1966. Pub. L. 89-487 (1966). FOIA's purpose is "to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold governors accountable to the governed." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 352, 261 (1976). In 1996, Congress passed the Electronic Freedom of Information Act Amendments that, *inter alia*, required that agencies process certain categories of documents on an expedited basis. Pub. L. 104-231 § 8 (1996). Typically, a FOIA Request must be processed within twenty business days. *See* 5 U.S.C. § 552(a)(6)(A)(i) (2013). However, expedited processing is to be granted in cases where either the "failure to obtain requested records...could reasonably be expected to pose an imminent threat to the life or physical safety of an individual," or "with respect to a request made by a person primarily engaged in disseminating information" there is an "urgency to

inform the public concerning actual or alleged Federal Government activity." *See* 5 U.S.C. § 552(a)(6)(E)(v) (2013). In these cases, an agency must process the FOIA request "as soon as practicable." *See* 5 U.S.C. § 552(a)(6)(E)(iii) (2013). "Where an agency fails to comply with the twenty-day deadline applicable to a standard FOIA request, the agency 'presumptively also fails to process an expedited request 'as soon as practicable." *Elec. Frontier Foundation v. Office of the Director of Nat'l Intelligence*, 542 F. Supp. 2d 1181, 1186 (N.D.Cal. 2008), citing *Elec. Privacy Information Center v. Dep't of Justice*, 416 F. Supp. 2d 30, 39 (D.D.C. 2006).

FOIA requires agencies to promptly provide a response to requests for documents, duly made, or to provide justification why the documents may be exempt from production. *See* 5 U.S.C. § 552 (2004). Under FOIA, the Government is also obligated to release a "general index of records" of records "which, because of the nature of their subject matter, the agency determines have become or are likely to become the subject of subsequent requests for substantially the same records." *See* 5 U.S.C. § 552(a)(2)(D), (E). Plaintiff complains that this law has not been observed. This Court "has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complaintant." *See* 5 U.S.C. § 552(a)(4)(B). There is no legal controversy over Plaintiff's right to demand that the DOJ be in compliance with FOIA, and the only documents subject to Exemption are the privacy-encumbered records withheld by the DOJ from the Red Herring Response (the "Exempted Records") pertaining to Lt. Choi, for which Plaintiff has requested a *Vaughn* Index. (Dkt. No. 12, Ex. A at 2, B at ¶ 46). (Flores Decl., Ex. I at ¶ 4j(i)-(ii)). (PL 56.1 Answer at ¶ 8.1e).

II. The First Amendment

This Court has original subject matter jurisdiction under 28 U.S.C. § 1331, as this matter arises under the Constitution, laws, or treaties of the United States.

The U.S. Supreme Court has established the right by "a reporter or an ordinary citizen" to "claim access to places like prisons, records, or channels of communication"[6] in respect of the judicial system, and in these cases, the U.S. Supreme Court has "upheld rights of access in a number of settings, including judicial proceedings."[7] [8] "[O]ur Constitution, and specifically the First Amendment to the Constitution ... protects the public's right to have access to judicial documents." *See United States v. Erie Cnty.*, 763 F.3d 235, 239 (2d Cir. 2014). *See also* U.S. Const. amend. I.. The intention of the Free Speech FOIA Requests is for Plaintiff to access *judicial documents* that evidence the legal basis of the Government's prosecution of activists.

Defendant's position forces Plaintiff to either engage in speech that has been preapproved by the Government or else to refrain from speaking altogether, by virtue that Plaintiff, a journalist, is unable to report the complete truth about the Government's prosecution of activists. Defendant has provided no authority for the Government's ability to impose those speech restrictions on Plaintiff or on the readers of Plaintiff's Web sites. Under the First Amendment, Plaintiff seeks to determine if the Government is retaliating against citizens, who engage in speech that is critical of the Government, and now the Government is trying to keep secret whether the Government is retaliating against citizens, who engage in speech that is critical of the Government, including, apparently, Plaintiff. This lawsuit does not ask the Court to make a determination about the legality of the Government's prosecution of activists ; instead, this lawsuit only asks the Court to compel the DOJ to comply with FOIA, so that Plaintiff *can access the records* about the Government's prosecution of activists. As a consequence of the DOJ's pattern and practice of violating FOIA with impunity, Plaintiff has suffered actual adverse and harmful effects, including, but not limited to, a *de facto* prohibition on publishing information about the Government's prosecution of activists, which is tantamount to

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6 Anthony Lewis, *A Public Right to Know About Public Institutions : The First Amendment as Sword*, 1980 Sup. Ct. Rev. 1.

7 *See Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984) ; *Globe Newspaper v. Superior Court*, 457 U.S. 596 (1982) ; *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980).

8 Phillip J. Cooper, *Rusty Pipes : The Rust Decision and the Supreme Court's Free Flow Theory of the First Amendment*, 6 Notre Dame J.L. Ethics & Pub. Pol'y 359 (1992).

prior restraint, which is unconstitutional. *Near v. Minnesota*, 283 U.S. 697 (1931). The DOJ's actions deny Plaintiff the ability to make this information available to the public and to Plaintiff's readers, resulting in the creation of a chilling effect on speech from Defendant's failure to comply with FOIA.

III. Rule 52

According to Rule 52(a)(6), the Courts may set aside findings by giving due regard to the credibility of witnesses.

Rule 52(a)(6) provides : "Findings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility." Fed. R. Civ. P. 52(a)(6).

In this instant case, there are no real witnesses, with the exception of the Declarants providing Declarations supporting the Defendants' pleadings and individuals submitting information and evidence to this Court, namely, officials at the DOJ, Defense Counsel, and Plaintiff (the "Parties"). Furthermore, there are statements being made by the Parties, and there is documentary evidence. Where there is documentary evidence that reflects on the credibility of the Parties, the Court must make determinations about the credibility of the Parties. Moreover, the Court has the discretion to infer from the documents. In *Case v. Morrisette,* 475 F.2d 1300, 1307 (D.C. Cir. 1973), the Court found that Rule 52 allowed for "inferences drawn from documents or undisputed facts."

Throughout the proceedings before this Court, Plaintiff has brought to the Court's attention the DOJ's lack of compliance with FOIA. These examples are not characterisations made by Plaintiff. Instead, these are conclusions based on documentary evidence cited in the Complaint ; in correspondence with the Court ; and facts, information, and arguments provided orally at the Initial Conference. It's undisputed that the DOJ does not comply with FOIA until it is forced to by the

proceedings in the courts.[9] Yet, the Court has not made any finding as to the DOJ's credibility on FOIA matters before this Court. Instead, the Court denied Plaintiff's request to conduct discovery in deference to Defendant's objection. (Dkt. No. 14). The Court further deferred to Defendant's concern that Plaintiff's aim was to "broaden the scope of this litigation" when the Court denied Plaintiff's request for additional time to further negotiate with the DOJ for the release of the documents and records responsive to the First FOIA Request. (Dkt. No. 19).

In accordance with Rule 52, Plaintiff respectfully requests that the Court consider the credibility of the DOJ before allowing the findings in each of its Omnibus Order and Memorandum and Order, respectively, to preclude Plaintiff's attempts to obtain responsive records to the Free Speech FOIA Requests and, in doing so, the Court should make a determination about the DOJ's misconduct and misrepresentations in this case and order sanctions and penalties on the DOJ as set forth further below.

IV. Sanctions

Federal courts maintain inherent powers "to protect their integrity and prevent abuses of the judicial process…." *Shepherd v. Am. Broad Companies, Inc.*, 62 F.3d 1469, 1474 (D.C. Cir. 1995). "The [Court's] inherent power encompasses the power to sanction attorney or party misconduct." *Id.* (collecting cases). Punitive sanctions, such as "fines, awards of attorneys' fees and expenses, [and] contempt citations," require a district court to find *clear and convincing* evidence of misconduct. *Id.* At 1478 ; *see also Chambers v. NASCO, Inc.*, 501 U.S. 32, 43-46 (1991).

"Because inherent powers are shielded from direct democratic controls, they must be exercised with restraint and discretion." *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764 (1980). A two-prong test exists provides guidance for courts to make a determination about sanctions being just. First, a "[C]ourt must find some connection between the sanctioned conduct and a process of the [C]ourt in the litigation before it."

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[9] *See, e.g.*, Hadas Gold, *NYT, Vice, Mother Jones top FOIA suits*, Politico (Dec. 23, 2014), http://www.politico.com/blogs/media/2014/12/nyt-vice-mother-jones-top-foia-suits-200325.html (noting that the top defendant was the DOJ).

Alexander v. FBI, 541 F. Supp. 2d 274, 303 (D.D.C. 2008). The misconduct must affect the Court's ability to "manage [its] own affairs so as to achieve the orderly and expeditious disposition of cases." *Chambers*, 501 U.S. at 59 (internal quotation marks and citation omitted). Here, there must be no doubt that the DOJ's pattern of misconduct and misrepresentations would have negatively affected the Court's ability to both decide the DOJ's summary judgment motion and manage the outstanding due diligence, the documents, and *Vaughn* Index, phase of this case. Second, "before exercising its inherent power to award sanctions, the [C]ourt must make an explicit finding that the target of the sanctions acted in bad faith." *Alexander*, 541, F. Supp. 2d at 304 (internal quotations marks and original alteration omitted) ; *see also Roadway Express*, 447 U.S. at 767.

V. The Court's Orders

A. The Court's Order of 16 September 2015

Following the Initial Conference on September 16, 2015, the Court, in part, denied Plaintiff's request to conduct discovery in this case, encouraged the Government to voluntarily search the files of Main Justice and produce any written guidelines for prosecution of activists, and to consider voluntarily producing at least some of the documents listed on the index" that Plaintiff had served that same day (the "Omnibus Order"). (*See* Dkt. No. 14) The Court's denial of Plaintiff's request to conduct discovery was referenced in the Court's subsequent order two months later.

B. The Court's Memorandum and Order of 09 November 2015

Following the seven weeks that the Court provided the parties to try to "resolve or at least narrow this FOIA lawsuit," the DOJ shut down any attempts by Plaintiff to further negotiate the release of duly requested records, and the Court shut down attempts by Plaintiff to conduct due diligence on the few responsive documents that the DOJ has produced. Despite that Plaintiff was only trying to obtain duly requested records, the Court admonished the Plaintiff for having "reportedly filed a new FOIA

Request, addressed to the Civil Rights Division of the DOJ" (the "Memorandum and Order"). (Dkt. No. 19 at ¶ 3)

VI. Rule 52 : Findings and Conclusions not yet made by the Court

The DOJ, in the case before us now, has provided defective Declarations that document bad faith searches for records, and this attests to the DOJ's deliberate intention to act in bad faith, raising questions about the integrity of DOJ officials, who are trying to ring-fence themselves from culpability for having violated FOIA for over two years, including in proceedings before this Court.

A. The DOJ violated FOIA and made false and misleading statements

1. The DOJ was in violation of FOIA for two years.

The DOJ has a duty to comply with FOIA. For over two years, the DOJ neither released any records nor explained to Plaintiff the reasons for the DOJ's failure to release records. (Dkt. 9 ¶ 27). As a consequence, the DOJ forced Plaintiff to commence legal action in this Court, wasting this Court's time and resources on a matter that should have been settled outside of litigation. But for the DOJ's pattern and practice of violating FOIA with impunity, this Court could be devoting its resources to other matters. Instead, this Court is having to police the DOJ's deliberate and reckless disregard for FOIA in this case. Moreover, the DOJ's pattern and practise of violating FOIA have caused harm to Plaintiff, who has been waiting for over two years to receive responsive records duly requested under FOIA. And the public has been the biggest loser, because the public has been kept in the dark about how the Government balances the rights of activists when the Government brings criminal charges against activists for their activism. Activists continue to face criminal charges and/or prosecution for peaceful activism, when all the activists are doing is peacefully calling for an end to racism, for example.[10] All of this damage is being done, solely because the DOJ refuses to comply with FOIA.

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[10] *See* Cristian Farias, *#BlackLivesMatter Activists in St. Louis Charged With Disturbance On Federal Property*, The Huffington Post (Aug. 10, 2015), http://www.huffingtonpost.com/entry/blacklivesmatters-st-louis-charges_55c93a8de4b0f1cbf1e61b8a.

There are adverse First Amendment implications for Plaintiff and for the public as a consequence of the DOJ's misconduct. As a journalist, Plaintiff seeks these records in order to inform the public.[11] (Dkt. 15 at ¶ 58). Demonstrating the danger to the First Amendment, the government precludes the full exercise of complete speech by restricting the public to engage in speech that lacks information in the records sought by the Free Speech FOIA Requests filed under FOIA by Plaintiff and constitutes prior restraint, which is unconstitutional. *Near v. Minnesota*, 283 U.S. 697 (1931).

2. The DOJ wrongly claims it can comply with FOIA at its discretion.

The DOJ has a duty to comply with FOIA. During discussions with Plaintiff, Defense Counsel has made the absurd representation to Plaintiff that the DOJ can comply with FOIA at its discretion. (PL 56.1 Answer at ¶ 65). Plaintiff objected to Defense Counsel's assertion to no avail, because Plaintiff complained to the Court in the Joint Status Report about the "DOJ's erroneous assertion that the DOJ can disclose records under FOIA at its own discretion." (Dkt. No. 18 at 2). Yet, the Court has allowed the DOJ to cling to this assertion, when that is not how FOIA works. FOIA is not optional or discretionary. Except for records subject to properly declared Exemptions, duly requested documents must be released by an agency. Moreover, an agency must disclose the rules and interpretations that form their policies and law. *See Brenan Ctr. For Justice v. DOJ*, 697 F. 3d 184, 195-6, 199-202 (2d Cir. 2012). This includes an agency's opinion about "what the law is" and "what is not the law and why it is not the law." *Tax Analysts v. IRS*, 117 F.3d 607, 617 (D.C. Cir. 1997) (*"Tax Analysts II"*). Plaintiff is seeking guidelines that balance the First Amendment rights, other Constitutional rights, civil liberties, and other civil rights of activists when the DOJ prosecutes activists

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[11] In response to Defendant's restrictions on speech, Plaintiff has produced YouTube videos to inform the public about the Government's refusal to answer the First FOIA Request. *See*, e.g., LGBTcivilRIRGHTS, *Why won't DOJ answer FOIA Request about Lt. Dan Choi ?*, YouTube (Oct. 15, 2013), https://youtu.be/JfqJ8FncI9Q ; astoria25, *Free Speech Implications of DOJ Denying FOIA Request on Lt. Daniel Choi*, YouTube (Dec. 4, 2013), https://youtu.be/axxpXab1ZVQ ; Louis Flores, *Protest against Eric Holder at NYU re: FOIA request about government prosecution of activists*, YouTube (Sept. 17, 2014), https://youtu.be/3HQ--oRpmK8.

for their activism. (Dkt. No. 12 at Ex. I to Ex. C). That the DOJ continues to flagrantly violate FOIA in proceedings before this Court means that this Court is wasting its time and resources on a matter that the DOJ should have reasonable and professionally resolved without litigation, except that the DOJ routinely violates FOIA until individuals makings requests must file lawsuits in order to compel compliance.[12] Under the DOJ's pattern and practise of violating FOIA, the Courts, individuals making requests under FOIA, and the public at large pay the price for the DOJ's violation of its duty to comply with FOIA, not to mention the adverse First Amendment implications for Plainitff and to the public as a consequence of the DOJ's misconduct to withhold or deny records for release.

3. The Declarations are inadequate, were filed by inexperienced Declarants, and describe searches made in bad faith.

The DOJ has a duty to comply with FOIA. In a FOIA proceeding before the U.S. District Court for New York's eastern district, the Court found that Declarants lacked sufficient personal knowledge on the subject matter for purposes of Rule 56(c)(4) when the Declarant "does not elaborate on the extent of the her involvement in processing plaintiff's search request … her supervisory position, combined with the thorough description of the search and her familiarity" with the agency's "search procedures." *See Davis v. DHS*, No. 11-CV-0203, 2013, WL 3288418 (E.D.N.Y. June 27, 2013)(Ross, J.).[13] In proceedings before this Court, the DOJ has produced Declarations that are inadequate, were filed by inexperienced Declarants, and described searches designed to essentially produce no records, and these cynical search "attempts" were made in obvious bad faith. In Plaintiff's Due Diligence Letter, Plaintiff objected to the Declarations, the Declarants, and the form of the searches. For example, Plaintiff noted

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12 *See, e.g.*, Hadas Gold, *NYT, Vice, Mother Jones top FOIA suits*, Politico (Dec. 23, 2014), http://www.politico.com/blogs/media/2014/12/nyt-vice-mother-jones-top-foia-suits-200325.html (noting that the top defendant was the DOJ).

13 Plaintiff apologises to the Court, but Plaintiff could not find an adequate citation, as Plaintiff's only copy of this Court ruling was provided as a digest on the DOJ Web site. *See* Office of Information Policy, *Davis v. DHS*, U.S. Department of Justice (June 27, 2013), http://www.justice.gov/oip/davis-v-dhs-no-11-cv-203-2013-wl-3288418-edny-june-27-2013-ross-j.

that the Declarants did not directly answer several items listed on the First FOIA Request. (Flores Decl., Ex. I at ¶ 1(i)). Instead, the Declarant Karin Kelly only directly addressed item I.1.C., item I.2.B., item I.3, and item I.4 (without complete itemisation) in her Declaration. (Kelly Decl. ¶ 18-20). Plaintiff made eighteen (18) requests in four categories of documents and records in the First FOIA Request. (PL 56.1 Answer ¶¶ 8, 9). Plaintiff requested an item-by-item clarification. (Flores Decl., Ex. I at ¶ 1(i)). However, Defense Counsel did not provide this item-by-item clarification. (Singh Decl., Ex. N). These are the acts of an agency violating its duty to comply with FOIA, even in proceedings before a Court.

The search for records was insincere and was made in bad faith to deliberately obscure records responsive to the First FOIA Request. In the First FOIA Request, Plaintiff noted that the public does not have information about how the Government balances the First Amendment rights, other Constitutional rights, civil liberties, and other civil rights of activists as the Government prosecutes activists for their activism. (Dkt. No. 12 at Ex. I to Ex. C at 2-3). Yet, none of the laws applicable to the prosecution of activists were searched. Plaintiff objected to the quoting of only portions of the First FOIA Request by Karin Kelly to others at the DOJ involved in the search for records, the appearance of a limitation of persons contacted in the search for records, and the limitations of "activists" and "targeted" in respect of the search strings used by Karin Kelly. (Flores Decl., Ex. I ¶ 1(e)-(g)). It is all the more telling that other reasonable and applicable search terms, like "demonstration" or "demonstrations," were not used by the DOJ in conducting the searches. The DOJ's unreasonably narrow construct of the search strings were intentionally designed to yield no search results. Only after the Court suggested that the DOJ provide at least some of the records on Plaintiff's Index of References to Records Requested under FOIA Request, did the DOJ, all of a sudden, *months later*, locate guidelines from the United States Attorneys' Manual applicable to "demonstrations." (Flores Decl., Ex. G at Tab D). *See U.S. Dep't of Justice*, United States Attorneys' Manual § 9-65.880, .881, .882. In *Davis*, the Court ruled that despite the fact that "Plaintiff made a request that reasonably described the records he was seeking," by

virtue of the way the search was conducted, it was as if the agency had "conducted no search at all." *Davis v. DHS.*[13] This is precisely how the DOJ has deliberately mishandled the Free Speech FOIA Requests. The DOJ deliberately overlooked Sola, Whitaker, and George in selecting Karin Kelly and Principa Stone to provide the defective Declarations.

Plaintiff questioned why the DOJ chose some employees, who had been employed less than one year to complete the Declarations. For example, Declarant Principa Stone has only been employed with the DOJ since April 2015, and Plaintiff questioned Principa Stone's experience, including her claim to be familiar with the "procedures followed" by the DOJ. (Flores Decl., Ex. I ¶ 2(a)-(c)). It is not known how long Declarant Karin Kelly has been employed by the DOJ, nor is it known what qualifications Karin Kelly has to provide a Declaration in this action, nor her familiarity with the documents requested by Plaintiff. (Flores Decl., Ex. I ¶ 1(a)). The DOJ deliberately chose not to answer the serious concerns about the Declarations and the Declarants in Defendant's Incomplete Due Diligence Response. (Singh Decl., Ex. N). In respect of the "no records" letter provided in lieu of a Declaration for the Third FOIA Response, *there is no description at all* about how that search was conducted and by whom. (Flores Decl., Ex. H). In respect of one Declaration, the Court, in *Davis*, noted that the Declarant "attests to familiarity with the procedures regarding the processing of FOIA requests, but says nothing about her personal knowledge or familiarity with the documents in question." As a consequence, the Court in *Davis* ruled that the Court "will not presume personal knowledge of the declarant." The ruling in *Davis* found another Declaration in the same matter was also deficient. *Davis v. DHS.*[13] The Court in *Davis* further found that that Declaration "does not explain how these experts arrived" at their determination or "whether plaintiff was asked to provide a more specific request." *Davis v. DHS.*[13] In the case before this Court now, the Declarant Karin Kelly admitted that in the search she conducted, she limited the search string to "activists" and "targeted," and this search string was not turning up records. (Kelly Decl. ¶ 12, 14-14). Beyond what limited steps Karin Kelly did take to search for records, Karin Kelly declared that she did not know of "other locations" to search or "other methods" to use

in her search, seemingly admitting her ignorance. (Kelly Decl. ¶ 9). Because the DOJ could not have conducted lawful searches by ignoring regulations and providing inadequate Declarations filed by inexperienced Declarants, the DOJ's actions are material to the lawfulness of the searches. In *Davis*, the Court noted that the agency which received a FOIA request did not conduct an "adequate and reasonable search for responsive records," because the agency was required under its own FOIA regulations "to tell plaintiff what additional information was needed or why plaintiff's request was insufficient." *Davis v. DHS.*[13] According to the DOJ's own FOIA regulations, "If after receiving a request a component determines that it does not reasonably describe the records sought, the component *shall inform* the requester what additional information is needed or why the request is otherwise insufficient" (emphasis added). *See* 28 eCFR § 16.3(b). Yet, the DOJ did not ask Plaintiff for alternative search strings to use in the conduct of the search. (PL 56.1 Answer ¶ 59). Not only did the DOJ violate its duty to comply with FOIA for over two years, but it also violated its own duty to comply with its own FOIA regulations.

It is important to note that Plaintiff received the Second FOIA Response *only seventeen (17) days* before the Parties were expected to file the Joint Status Report with the Court. Plaintiff had less than this time to review the Second FOIA Response, prepare Plaintiff's Due Diligence Letter, and correspond with Defense Counsel in respect of the Free Speech FOIA Requests and the outstanding due diligence, documents, and the *Vaughn* Index. Importantly, Plaintiff has made requests, including requests for clarification, on many matters in respect of due diligence that could have resolved many of these issues, including in respect of the issues with the Declarants and the Declarations. (Flores Decl., Ex. I). Plaintiff has been mindful to attempt to resolve as many of these issues without having to "ask the Court to address the numerous open issues without the benefit of possibly being able to reach further independent resolution with the DOJ." *Id*. However, the DOJ has not been interested in curing or mitigating its violations of FOIA in negotiations with Plaintiff, telling the Court that the DOJ "does not believe that further meet and confers would be an efficient use of the

parties' time and resources at this time." *Id*. From the time when Plaintiff sent Plaintiff's Due Diligence Letter to Defendant, the Parties had less than ten (10) days to resolve due diligence issues in regards to the DOJ's FOIA responses ; yet the DOJ was not interested in resolving these issues. The DOJ's wilful refusal to comply with FOIA or to negotiate with Plaintiff--*so that the DOJ could comply with FOIA*--is forcing this Court to insert itself on a micro-management level to review standard, routine issues of due diligence that the Court need not otherwise involve itself and is having an adverse affect on how the Court will have to manage its resources, case loads, and its affairs. Moreover, since Plaintiff is appearing *pro se*, the DOJ is taking advantage of dispositive motion practise to place Plaintiff at an unfair advantage, further compounding the adverse First Amendment implications for Plaintiff and the public in this matter.

4. The DOJ wrongly claims to have lost the First FOIA Request, the DOJ wrongly closed out the First FOIA Request in its systems, and the DOJ wrongly opened a new FOIA request in its systems for the First FOIA Request.

The DOJ has a duty to comply with FOIA, and officials, who are attorneys at the DOJ, have professional responsibilities to uphold their duties as officers of the Courts. It is clear and convincing that the DOJ is willing to breach its duty to comply with FOIA. In the case before this Court now, the DOJ claims it could not locate the First FOIA Request, and, as a consequence, it did not re-open the original request (Request No. 13-1506). (Dkt. No. 9 at ¶ 4, 8, and 34-38). (Flores Decl., Ex. D at 2). Nor did the DOJ re-open the FOIA Appeal (Appeal No. AP-2014-00890). (Flores Decl., Ex. D at 1). Instead, the DOJ apparently just closed out the original request and the FOIA Appeal. (Stone Decl. ¶ 5). Later, the DOJ opened a new request for the First FOIA Request, after the proceedings commenced before this Court (2015-02422). (Stone Decl. ¶ 6). (Kelly Decl. ¶ 3). Plaintiff asserts that by closing out the original request, the DOJ was attempting to ringfence DOJ officials, including, but not limited to, Sola, Whitaker, and George, who never answered the First FOIA Request, from having to provide Declarations about their acts of bad faith before this Court. Plaintiff has requested corrected Declarations, including an umbrella declaration, that address Plaintiff's numerous dealings with Sola,

the paralegal at the DOJ, and the Congressional Request. (Flores Decl., Ex. I at ¶ 2(c), (e)-(f)). Moreover, Whitaker was involved in the original request in respect of the First FOIA Request. (PL 56.1 Answer ¶ 11a, 17b). However, none of the Declarations provided by the DOJ reference, for example, Whitaker's knowledge or involvement with the DOJ's search for records. (Stone Decl.). (Kelly Decl.). And the DOJ never answered the Congressional Request. (Dkt. No. 15 at ¶ 49).

The DOJ made a material misrepresentation in this case, when the DOJ claimed that it did not have a copy of the First FOIA Request. (Dkt. No. 9 at ¶ 4, 8, and 34-38). After the DOJ was challenged about this by Plaintiff during negotiations for the release of records that were really responsive to the First FOIA Request, the DOJ later changed its representations when the DOJ filed its Amended Answer. (Dkt. No. 17 at ¶ 4, 8, and 34-38). The representation in ¶ 34 changed from "despite searching its records, Defendant has been unable to find a copy of Plaintiff's FOIA request in its files" to "despite searching its records, EOUSA was unable to find Plaintiff's April 30, 2013 FOIA request in its files." (Dkt. No. 9 at ¶ 34 and Dkt. No. 17 at ¶ 34). The DOJ made this change after Plaintiff pointed out to the Court at the Initial Conference that Defendant admitted in the Answer that the DOJ had received a copy of Plaintiff's e-mail, attached to which was a copy of the First FOIA Request. (PL 56.1 Answer ¶ 12). (Dkt. No. 9 at ¶ 4, 29 and Dkt. No. 12 at 2-3). Defense Counsel later admitted as much, when, during a 16 October 2015 Telephone Conference between Defense Counsel and Plaintiff, that George, who had prosecuted Lt. Choi, had a copy of the First FOIA Request all along, rendering as false the DOJ's claim that it had no copy of Plaintiff's First FOIA Request. (PL 56.1 Answer ¶ 12). That George may have contributed the DOJ's inability to respond to the First FOIA Request, to the extent that it really was true that the DOJ had either misplaced the request file or the First FOIA Request, means that George may have been interfering with the DOJ's compliance with FOIA.

Interfering with government administration is a violation of Penal Law §195.05, Second-Degree Obstruction of Government Administration. *See* N.Y. Pen. Law §195.05. Moreover, the Court in *Davis* had to consider an instance where the agency

receiving a FOIA request had misplaced the FOIA request. After reviewing a Declaration based on a misplaced FOIA request, the Court in *Davis* ruled that the request had to be re-opened by the agency for processing. *Davis v. DHS.*[13] Calculating as it is about breaching its duty to comply with FOIA, the DOJ knows what the rules are, because it breaks those rules, even in proceedings before this Court, forcing this Court to address Plaintiff's complaints about each and every way that the DOJ is breaking the law. But for the justice expected from and the discretion available to this Court, no requester seeking records from the DOJ can expect to receive any records under FOIA unless the Court stops everything it is doing and micro-manages all due diligence aspects pertaining to long-outstanding FOIA requests, as is happening now. Furthermore, lawyers have a special obligation as officers of the court. "In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse." Model R. Prof. Conduct 3.3(d) (ABA 2011). Moreover, under Comment 12 to Model R. Prof. Conduct 3.3(d), "Lawyers have a special obligation to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process, such as bribing, intimidating or otherwise unlawfully communicating with a witness, juror, court official or other participant in the proceeding, *unlawfully destroying or concealing documents or other evidence or failing to disclose information* to the tribunal when required by law to do so"[14] (emphasis added). All these duties and obligations exist that should have compelled the DOJ to comply with FOIA, but not even as attorneys are the officials at the DOJ interested in complying with FOIA, not even in proceedings before this Court. The DOJ's willingness to breach its duty under FOIA has a consequence to unduly burden this Court with this proceeding. Ferguson activists are being arrested and charged with crimes for peacefully demonstrating against each of racism, police brutality, and the lack of accountability for police misconduct, for

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[14] *See American Bar Association*, Comment on Rule 3.3, Model Rules of Professional Conduct (1983), http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_3_3_candor_toward_the_tribunal/comment_on_rule_3_3.html.

example, and the public does not know why activists are being arrested for peaceful demonstrations.[15] (Flores Decl., Ex. Q). The DOJ's violation of FOIA also acts to deny Plaintiff records duly requested under FOIA, and Plaintiff is unable to report about these records for the benefit of the public. The DOJ's breach of duty is the proximate cause of these damages to Plaintiff, and there are adverse First Amendment implications for Plaintiff and the public as a consequence of the DOJ's violations of FOIA.

5. Assistant U.S. Attorney Angela George improbably claimed she did not have a copy of the U.S. Attorneys' Manual.

The DOJ has a duty to comply with FOIA, and officials, who are attorneys at the DOJ, have professional responsibilities to uphold their duties as officers of the Courts. According to the Declaration of Karin Kelly, during Karin Kelly's search for records that later formed the Red Herring Release, Karin Kelly wrote that the "AUSA," or the Assistant U.S. Attorney with whom Karin Kelly spoke, "did not have a manual to refer to regarding the prosecution of 'activists.' " (Kelly Decl. ¶ 18). The "AUSA" was identified by Defense Counsel to be the AUSA "assigned to the [Lt.] Choi prosecution," or, as the records in the Red Herring Response indicate, George. (Gov't Mem. at 10). (Flores Decl., Ex. F). Furthermore, when the EOUSA produced the Red Herring Response, the EOUSA wrote : "A search for records located in United States Attorney's Office for the District of Columbia (USAO/DC) has revealed no responsive records for items 1 through 4 of your FOIA/PA request." (Flores Decl., Ex. F at 1). After Plaintiff served Defense Counsel with Plaintiff's Index of References to Records Requested under FOIA Request at the Initial Conference, and after the Court recommended that the DOJ conduct a search of Main Justice, all of a sudden, *months later*, the DOJ located guidelines from the United States Attorneys' Manual applicable to "demonstrations." (Flores Decl., Ex. G at Tab D). *See U.S. Dep't of Justice*, United States Attorneys' Manual § 9-65.880-82. The DOJ also

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[15] *See* Cristian Farias, *#BlackLivesMatter Activists in St. Louis Charged With Disturbance On Federal Property*, The Huffington Post (Aug. 10, 2015), http://www.huffingtonpost.com/entry/blacklivesmatters-st-louis-charges_55c93a8de4b0f1cbf1e61b8 a.

produced other records from the United States Attorney's Manual. (Flores Decl., Ex. G at Tabs E and G).

As indicated, Plaintiff has objected to how the DOJ, its officials, including officials at its components, have deliberately conducted faulty searches to basically have conducted no search at all. It is improbable to believe that George, who is an Assistant U.S. Attorney, and who tried Lt. Choi on criminal charges regarding his activism, would not have a copy of the United States Attorneys' Manual. It is likewise improbable that no person at the U.S. Attorney's Office for the District of Columbia would have a copy of the United States Attorneys' Manual. The Government has acknowledged procedures that likely have records about the prosecution of activists. Guidelines from the United States Attorneys' Manual allude to the likely existence of responsive records. (Flores Decl., Ex. G at Tab D). *See U.S. Dep't of Justice*, United States Attorneys' Manual § 9-65.880-82. Under FOIA, the Government is also obligated to release a "general index of records" of records "which, because of the nature of their subject matter, the agency determines have become or are likely to become the subject of subsequent requests for substantially the same records." *See* 5 U.S.C. § 552(a)(2)(D), (E). Thus, it is *substantively questionable* that the DOJ is accurate when it asserted that there are no responsive records. (Gov't Mem. at 5). Because the DOJ could not have lawfully made representations to the Court that there are no responsive records, the misstatement was material to the lawfulness of the DOJ's FOIA responses, particularly given that DOJ produced guidelines from the United States Attorneys' Manual, and these guidelines allude to the likely existence of responsive records.

Interfering with government administration is a violation of Penal Law §195.05, Second-Degree Obstruction of Government Administration. *See* N.Y. Pen. Law §195.05. Like *The New York Times* journalist Charles Savage has observed, an executive agency can omit an embarrassing document from a FOIA request, and, when caught, delay its disclosure by several months. (Flores Decl., Ex. GG). This Court should not and cannot countenance the withholding of records in such deliberate and wanton manner. This Court, Plaintiff, and the public should be able to rely on lawyers at the U.S.

Attorney's Offices of the District of Columbia and for New York's eastern district, at Main Justice, and at other components of the DOJ, to honour their professional duty and to comply with the law. Breaches of those duties act to undermine proceedings before this Court. "In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse." Model R. Prof. Conduct 3.3(d) (ABA 2011). The consequence of the breach of the duties owed by the DOJ and their officials is to waste this Court's time, waste Plaintiff's time, and keep the public in the dark about how the Government regards the rights of activists when the Government brings criminal charges against activists for their activism, and there are adverse First Amendment implications for Plaintiff and the public. Because the DOJ could not have lawfully produced the Red Herring Response had it not made misrepresentations about the United States Attorneys' Manual, the suppression of the DOJ guidelines about the prosecution of activists from the Red Herring Response was material to the lawfulness of the DOJ's searches for responsive records.

6. The DOJ won't produce a *Vaughn* Index, as is required.

The DOJ has a duty to comply with FOIA, and when the DOJ breaches that duty, it is acting in bad faith and raises questions about the DOJ's lack of credibility in proceedings before this Court. Plaintiff has requested at least twice an index of the Exempted Records, but the DOJ has not produced an index of the Exempted Records. (Dkt. No. 12, Ex. A at 2, B at ¶ 46). (Flores Decl., Ex. I at ¶ 4j(i)-(ii)). (Singh Decl., Ex. N). The request of a *Vaughn* Index is used to, amongst other things, to identify each document and to, essentially, confirm the correct application of Exemptions. *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), cert. denied 415 U.S. 977 (1974). *Citizens Comm'n on Human Rights v. FDA*, 45 F.3d 1325, 1326 n. 1 (9th Cir. 1995). The DOJ's failure to provide such a routine record that can reasonably be expected that would be requested to confirm the correct application of Exemptions points to the degree to which the DOJ has been uncoöperative and/or hindering the Free Speech FOIA Requests. The DOJ's

willingness to breach its duty to comply with FOIA means that the Court must now intervene, review information about Plaintiff's request for the *Vaughn* Index, wasting this Court's time and resources, just so that Plaintiff can receive a routine document that under case law an agency knows and can expect to know will be requested of it. The DOJ's actions are having an adverse effect on the Court's resources. The DOJ's actions are denying Plaintiff records that Plaintiff is owed in this proceeding, and there are adverse First Amendment implications for Plaintiff and the public as a consequence of the DOJ's misconduct.

7. The DOJ has not asserted Exemptions for documents it has withheld, and the DOJ has waived it's right to invoke any Exemptions in respect of such withheld records.

The DOJ has a duty to comply with FOIA, and when the DOJ violates its duty to comply with FOIA, the DOJ must be found in contempt and face sanctions and penalties. In *Davis*, the Court noted that an agency, which has received a FOIA request but has not asserted a basis for withholding records, must release the records. *Davis v. DHS.*[13] FOIA requires disclosure of all agency records at the request of the public, unless the records fall within one of nine narrow Exemptions. *See* 5 U.S.C. § 552(b). The DOJ has acknowledged the likely existence of responsive records, but the DOJ is deliberately failing to inform Plaintiff and this Court about the possible existence of records about the prosecution of activists.[16] Except for the Exempted Records pertaining to the Red Herring Response, the DOJ has not expressly claimed Exemptions for any responsive records, and, therefore, the DOJ has explicitly waived its right to claim exemptions for responsive records (like those referenced in the United States Attorneys' Manual) and any related records Plaintiff has sought.

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[16] For example, when the Federal Bureau of Investigation ("FBI") begins an investigation of activists under one of the DOJ's guidelines, the FBI will consult with an U.S. Attorney. (Flores Decl., Ex. G at Tab D). *See U.S. Dep't of Justice*, United States Attorneys' Manual § 9-65.881. Under the same section, there is legal advice given to the DOJ by the U.S. Department of State ("DOS") about criminal charges being disposed under local law. *Id*. This acknowledgement defeats the Government's ability to maintain its Glomar-equivalent response with respect to the line-items in the First FOIA Request, particularly in respect of the first sub-item under request 1.[16] Thus, it is *substantively questionable* that the DOJ is accurate when it asserted that there are no responsive records. (Gov't Mem. at 5).

> "The Freedom of Information Act was conceived in an effort to permit access by the citizenry to most forms of government records. In essence, the Act provides that all documents are available to the public unless specifically exempted by the Act itself. This court has repeatedly stated that these exemptions from disclosure must be construed narrowly, in such a way as to provide the maximum access consonant with the overall purpose of the Act. By like token and specific provision of the Act, when the Government declines to disclose a document the burden is upon the agency to prove de novo in trial court that the information sought fits under one of the exemptions to the FOIA. Thus the statute and the judicial interpretations recognize and place great emphasis upon the importance of disclosure." *Vaughn v. Rosen*, 484 F.2d 820, 823 (internal footnotes omitted).

Here, the DOJ has only asserted exemptions in respect of the Exempted Records pertaining to the Red Herring Release.

Furthermore, the Court has already ruled in Plaintiff's favour, when the Court ordered the DOJ to conduct a search of Main Justice and to produce at least some of the records on Plaintiff's Index of References to Records Requested under the FOIA Request. The Court's ruling in favour of Plaintiff carries significant weight. The Court of Appeals for the District of Columbia has ruled that " 'agencies [may] not make new exemption claims to a district court after the judge has ruled in the other party's favor,' nor may they 'wait until appeal to raise additional claims of exemption or additional rationales for the same claim.' " *Senate of P.R. v. DOJ*, 823 F.2d 574, 580 (D.C. Cir. 1987) (quoting *Holy Spirit Ass'n v. CIA*, 636 F.2d 838, 846 (D.C. Cir. 1980)). *See also Tax Analysts v. IRS*, 152 F. Supp. 2d 1, 25-26 (D.D.C. 2001) (*"Tax Analysts III"*) (refusing to revisit issue of attorney-client privilege, because the Court ruled on attorney-client privilege issue in previous opinion), *aff'd in pertinent part, rev'd in part*, 294 F.3d 71 (D.C. Cir.).

Despite how FOIA works in respect of Exemptions, the DOJ is not complying with the law. In Plaintiff's Due Diligence Letter, Plaintiff requested that the DOJ provide clarification about why the DOJ did not answer all of the questions in Plaintiff's Index of References to Records Requested under the FOIA Request. (Flores Decl., Ex. I at ¶ 4(iv)). Yet, the DOJ did not address this question. (Singh Decl., Ex. N). The DOJ is not providing records, and it does not claim Exemptions, as required by the law. As a

consequence, the DOJ is making this Court micromanage almost every aspect of the Free Speech FOIA Requests rather than exercising professional judgment in respect of reasonable due diligence requests. Because the DOJ could not have lawfully conducted a search for responsive records and ignored the records being created under the DOJ's own guidelines in the United States Attorneys' Manual, the DOJ's bad faith searches for records was material to the lawfulness of the DOJ's search for responsive records. The net effect of the DOJ's bad faith acts is to deny Plaintiff records, and there are adverse First Amendment implications for Plaintiff and for the public as a consequence of the DOJ's misconduct.

B. The Court ignored the DOJ's lack of credibility

1. It is entirely credible that the Government lacks credibility in matters of FOIA before this Court.

In 2012, the FOIA Project published a report citing a study by the Transactional Records Access Clearinghouse, noting that more court complaints seeking to force the Government to comply with FOIA were filed in the first term of the Obama administration than during the last term of the administration of former President George W. Bush, lending "credence" to the criticism by activists about the Obama administration's lack of commitment to transparency. (Flores Decl., Ex. KK). The news publication *Mother Jones* noted that "filing a FOIA request and getting information back is still a struggle." (Flores Decl., Ex. BB). Furthermore, specifically in respect of the DOJ, the U.S. House of Representatives Committee on Oversight and Government Reform sent a letter to the OIP at the DOJ to draw attention to, amongst other issues, the backlog of FOIA requests. (Flores Decl., Ex. CC). Moreover, the National Press Club was moved to send a joint letter signed on behalf of 49 groups, pressing the OIP at the DOJ to honor its obligations under FOIA. (Flores Decl., Ex. DD). As if that was not enough, according to The Associated Press, "The government took longer to turn over files when it provided any, said more regularly that it couldn't find documents and refused a record number of times to turn over files quickly *that might be especially newsworthy*" (emphasis added), adding that "in nearly 1 in 3 cases," the Government's "initial

decisions to withhold or censor records were improper under the law—but only when it was challenged." (Flores Decl., Ex. FF). Incredulously, the Government is coming into this Court and expects this Court to accept its excuses, its delay tactics, its attempts at obfuscation, and its efforts to create red herrings in this FOIA action – and still expect that the Court will accord the DOJ credibility ? *Really ?*

2. The evidence is clear and convincing that the DOJ lacks credibility in matters of FOIA before this Court.

The Government, as represented by the Declarants Karin Kelly, Princina Stone, and Rukhsanah Singh, have not directly answered several items listed on the First FOIA Request. (PL 56.1 Answer at ¶ 8.1). It should be noted that Defense Counsel Rukhsanah Singh became a *de facto* Declarant on behalf of the Government when she provided the "no records letter" that constituted the Third FOIA Response without providing a Declaration, as requested by Plaintiff. (Flores Decl., Ex. H). (Flores Decl., Ex. I at ¶ 3(a)). (Flores Decl., Ex. J). The Government makes the representation to this Court that the Government has processed or answered the First FOIA Request. "It is Defendant DOJ's position that all non-exempt records responsive to Plaintiff's FOIA request to the EOUSA that is the subject of this action have been released to Plaintiff." (Dkt. No. 18 at 3). Moreover, the Government continues to sidestep the fact that the EOUSA never acknowledged or answered the Congressional Request sent to it on Plaintiff's behalf by U.S. Representative Joseph Crowley. (Dkt. No. 12 Ex. I to Ex. D). (Dkt. 15 at ¶ 49). Defense Counsel further made a misrepresentation to Plaintiff that no component of the DOJ had a Criminal Division that had not yet already been searched for records responsive to the First FOIA Request. (PL 56.1 Answer at ¶ 8.1). Contrary to Defense Counsel's representation, after Plaintiff searched the DOJ Web site, Plaintiff discovered that the Civil Rights Division had its own Criminal Division, prompting Plaintiff to prepare and file the Second FOIA Request as a way to "close the loop" on the records Plaintiff has been seeking--nothing more, nothing less. (Flores Decl., Ex. I at ¶ 4(m)(v)).

Under FOIA, the DOJ knows to expect that requests could be made for records that "are likely to become the subject of subsequent requests for substantially the same

records" including the provision of a "general index" of such records. *See* 5 U.S.C. § 552(a)(2)(D)-(E). Furthermore, under the DOJ's own FOIA regulations, "Each component is responsible for determining which of its records are required to be made publicly available, as well as identifying additional records of interest to the public that are appropriate for public disclosure, and for posting and indexing such records." *See* 28 eCFR § 16.2. What is more, at the Initial Conference, the Court noted that nothing precluded Plaintiff from filing a FOIA request to perfect Plaintiff's pursuit of general guidelines for the prosecution of activists. (PL 56.1 Answer ¶ 40.2).

3. It is unequivocal that the DOJ lacks credibility in matters of FOIA before this Court.

There is additional, corroborating evidence that the DOJ lacks credibility in matters of FOIA before this Court. Plaintiff's Free Speech FOIA Requests seeks records about how the DOJ balances First Amendment rights, other Constitutional rights, civil liberties, and other civil rights of activists against charges that the DOJ brings against activists. The DOJ has not acted to defend the Federal interest in government transparency in this area, particularly since government transparency is accomplished through the Government's compliance with FOIA. The DOJ has not acted to defend the substantial public interest in having an informed citizenry, which is vital to the functioning of our democratic form of government. The DOJ is not defending substantial Federal interests, such as the right of citizens to engage in activism, which is an extension of Federal franchise rights to participate in government. Furthermore, within the last year, the DOJ has advised the entire Executive Branch of the federal government against viewing the U.S. Senate's torture report, even though the torture report was a public document. (PL 56.1 Answer ¶ 92). And officials with the DOJ and members of the National Association of Assistant United States Attorneys have lobbied federal legislators to oppose improving FOIA reform legislation. (PL 56.1 Answer ¶ 93). When viewed against the backdrop of how the DOJ undermines the free access of Congressional documents and even engages in backroom lobbying to weaken FOIA, the DOJ's pattern and practise of subverting FOIA is clear. (Flores Decl., Ex. II, LL). Why

does the DOJ want less government transparency, especially in the area of *judicial records*, and not more ?

In one of the U.S. Supreme Court cases, where the public was granted access to judicial proceedings, the U.S. Supreme Court ruled that : "the open processes of justice serve an important prophylactic purpose, providing an outlet for community concern, hostility, and emotion. Without an awareness that society's responses to criminal conduct are underway, natural human reactions of outrage and protest are frustrated and may manifest themselves in some form of vengeful 'self-help,' as indeed they did regularly in the activities of vigilante 'committees' on our frontiers," adding that the people have a natural yearing to see justice done. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 571 (1980). As a consequence of the DOJ's wilful subversion of FOIA, the public doesn't know how the Government arrives at justice when it prosecutes activists. The Government is keeping the public in the dark. The public is left bewildered when justice is administered in a "covert manner." "To work effectively, it is important that society's criminal process 'satisfy the appearance of justice,' and the appearance of justice can be best provide by allowing people to observe it." *Id.* at 571-2, citing *Offutt v. United States*, 348 U.S. 11, 14 (1954).

C. DOJ must be sanctioned for losing the First FOIA Request, for not accounting for its loss, for its misconduct and misrepresentations, for producing inadequate Declarations by inexperienced Declarants, for conducting bad faith searches for records, and for its refusal to take remedial actions.

1. The DOJ had a duty to preserve and process FOIA requests and to account for its loss

After instances of communication between Counsel and the DOJ, the OIP replied to Counsel on May 20, 2014, informing Counsel that the Request was being remanded by the OIP to the EOUSA "for a search for responsive records," adding that, "If your client is dissatisfied with my action on your appeal, the Freedom of Information Act permits him to file a lawsuit in federal district court in accordance with 5 U.S.C. § 522(a)(4)(B)." (Flores Decl., Ex. D at 1). Once litigation has commenced, or once a party

"anticipates litigation," a party is under an obligation to preserve potentially relevant evidence. *Smith v. Café Asia*, 246 F.R.D. 19, 21, n.1 (D.D.C. 2007). A party has "an obligation to preserve and also not to alter documents it knew or reasonably should have known were relevant ... if it knew the destruction or alteration of those documents would prejudice [the opposing party]." *Shepard v. Am. Broad. Cos.*, 62 F.3d 1469, 1481 (D.C. Cir. 1995) (citing *Akiona v. United States*, 939 F.2d 158, 198 (9th Cir. 1991)). Once a party has notice that "the evidence is relevant to the litigation" or "when a party should have known that the evidence may be relevant to future litigation," it is under a duty to preserve the relevant documents. *Gerlich v. Dep't of Justice*, 711 F.3d 161, 170 (D.C. Cir. 2013) (citing *Kronisch v. United States*, 150 F.3d 112, 126 (2d Cir. 1998)).

2. The DOJ acted in bad faith when it destroyed or lost the First FOIA Request and failed to preserve responsive records.

The DOJ has a duty not to destroy evidence. Failure to preserve potentially relevant evidence becomes spoliation when that evidence is destroyed or is significantly and meaningfully altered. "Each component shall preserve all correspondence pertaining to the requests that it receives under this subpart, as well as copies of all requested records, until disposition is authorized pursuant to title 44 of the United States Code or the General Record Schedule 14 of the National Archives and Records Administration. Records shall not be disposed of or destroyed while they are the subject of a pending request, appeal, or lawsuit under the FOIA." *See* 28 eCFR § 16.9. Actual destruction of documents, disposal of electronic devices, silence, and delay without demonstrating the slightest concern for the integrity of the judicial process or the rights of Plaintiff, constitute spoliation. No facts are known about what the DOJ did to destroy or misplace the First FOIA Request. (Flores Decl. ¶ 4). Interfering with government administration is a violation of Penal Law §195.05, Second-Degree Obstruction of Government Administration. *See* N.Y. Pen. Law §195.05. The DOJ didn't--and doesn't--care, an attitude that it has carried into every aspect of its dealings with Plaintiff, even in proceedings before this Court. The Government has treated Plaintiff as an adversary from the receipt of the First FOIA Request, not as a rightful participant in a

FOIA regime that enforces principles of open government subject to oversight by its citizens.

3. The DOJ broke the law when George claimed she had no copy of the U.S. Attorneys' Manual and when the DOJ claimed it had no copy of the First FOIA Request.

Despite being an Assistant U.S. Attorney and having tried activists, George has claimed that she had no manual that referred to the prosecution of activists. (Kelly Decl. ¶ 18). This statement is misleading and patently false, as the DOJ has produced records from the United States Attorneys' Manual that reference the prosecution of activists. (Flores Decl., Ex. G at Tabs D, E, and G). *See e.g., U.S. Dep't of Justice*, United States Attorneys' Manual § 9-65.880, .881, .882. It was also disingenuous and misleading for the DOJ to claim that the request file could not be found in 2014 during the OIP's review of the FOIA Appeal (the "OIP Remand Memo"). (Flores Decl., Ex. D at 2). The DOJ never released "any records that are responsive to Plaintiff's FOIA request at issue in this action" and had "not yet provided an explanation to Plaintiff," as of the filing of the DOJ's Answer in this action. (Dkt. No. 9, ¶ 27). The DOJ never sent Plaintiff a letter informing Plaintiff that his request for a fee waiver had been denied, in accordance with the statement made to Plaintiff by Sola. (Dkt. No. 15, ¶ 46). There was nothing that could be lost or misplaced from the request file (2013-1506) or from the FOIA Appeal (Appeal No. AP-2014-00890) in respect of the First FOIA Request, except for the First FOIA Request itself. However, as shown by Plaintiff and admitted to by Defense Counsel, George had a copy of the First FOIA Request all along. (PL 56.1 Answer ¶¶ 12, 77, 91). (Dkt. No. 9 at ¶ 4, 29 and Dkt. No. 12 at 2-3). Moreover, Plaintiff had delivered an electronic copy of the First FOIA Request to William Miller, a public information officer with the U.S. Attorney's Office for the District of Columbia ("Miller"). (Dkt. No. 15, ¶ 4). Any search for responsive records prior to the commencement of the action before this Court would have undoubtedly involved checking with George, as Karin Kelly did for the preparation of her Declaration in tis action. (Kelly Decl., ¶ 16-18). Yet, for all the time prior to the commencement of this action, and after, the DOJ has never articulated when

the request file went missing. (Flores Decl., Ex. I at ¶ 2(g)). The DOJ has also failed to articulate whether George ever informed the EOUSA that she had a copy of the First FOIA Request *all along*. Interfering with government administration is a violation of Penal Law §195.05, Second-Degree Obstruction of Government Administration. *See* N.Y. Pen. Law §195.05.

4. Punitive sanctions and penalties are necessary to ensure the DOJ no longer engages in deliberate attempts to violate FOIA with impunity.

Plaintiff made a detailed request to the DOJ, offering the DOJ the opportunity to remediate its faulty and defective Declarations made by inexperienced Declarants and to remediate its incomplete and bad faith searches for records. (Flores Decl., Ex. I). The Government's response was to snidly answer only two items on Plaintiff's Due Diligence Letter. (Flores Decl., Ex. J). Moreover, in respect of two long-awaited documents, the "Myers memo (email)" and "Capt. Guddemi's November 22 email," the Government produced records that were redacted without any Exemption under FOIA declared for such redaction. (Flores Decl., Ex. G at Tabs A and B). Plaintiff requested that the DOJ provide clarification about the redactions in the "Myers memo (email)" and in "Capt. Guddemi's November 22 email." (Flores Decl., Ex. I at ¶ 4(b)(ii), (c)(ii)). But the DOJ would not address the issue of the redactions in Defendant's Incomplete Due Diligence Response. (Singh Decl., Ex. N). Plaintiff also draws the Court's attention to the Government's Exhibit, which purports to be a hardcopy of Plaintiff's e-mail transmitting the electronic copy of the First FOIA Request. (Singh Decl., Ex. F). The Court will note that this hardcopy, which was sworn to be "a true and correct copy," is lacking or was stripped of any indication that an electronic copy of the First FOIA Request was attached, as is normally indicated in hardcopy print-outs of e-mails with attachments. *See, e.g.*, Flores Decl., Ex. JJ (showing that attachment was included in the e-mail). The Court will note that Miller acknowledged receiving a copy. (Flores Decl., Ex. RR).

Spoilation has been defined as the "destruction or significant alternation of evidence, or the failure to preserve property for another's use as evidence in pending or

reasonably foreseeable litigation." *West v. Goodyear Tire & Rubber Co.*, 167 F.3d 776, 779 (2d. Cir. 1999). The spoliation of evidence germane to "proof of an issue at trial can support an inference that the evidence would have been unfavourable to the party responsible for its destruction." *Kronisch v. United States*, 150 F.3d 112, 126 (2d. Cir. 1998), as quoted in *Byrnie v. Town of Cromwell, Bd. Of Educ.*, 243 F. 3d. 93, 107 (2d Cir. 2001). Failure to preserve potentially relevant evidence becomes spoliation when that evidence is destroyed or is significantly and meaningfully altered. "Each component shall preserve all correspondence pertaining to the requests that it receives under this subpart, as well as copies of all requested records, until disposition is authorized pursuant to title 44 of the United States Code or the General Record Schedule 14 of the National Archives and Records Administration. Records shall not be disposed of or destroyed while they are the subject of a pending request, appeal, or lawsuit under the FOIA." *See* 28 eCFR § 16.9. Plaintiff asks the Court to address the DOJ's possible spoilation of records responsive to FOIA and the Government's entry of suspect, spoiled, or false records into evidence.

Sanctions serve a "threefold purpose of (1) deterring parties from destroying evidence ; (2) placing the risk of an erroneous evaluation of the content of the destroyed evidence on the party responsible for its destruction ; and (3) restoring the party harmed by the loss of evidence helpful to its cause to where the party would have been in the absence of the spoliation." *See West*, 157 F.3d. at 779. Furthermore, "[i]n borderline cases, an inference of spoliation, in combination with 'some (not insubstantial) evidence' for the plaintiff's cause of action, can allow the plaintiff to survive summary judgment." *Kronisch*, 150 F.3d. at 128, as quoted in *Byrnie*, 243 F.3d. at 107.

One year before Plaintiff filed this action in this Court, the OIP wrote to Plaintiff's Counsel in the OIP Response, informing Plaintiff's Counsel that : "If your client is dissatisfied with my action on your appeal, the Freedom of Information Act permits him to file a lawsuit in federal district court in accordance with 5 U.S.C. § 552(a)(4)(B)." (Flores Decl., Ex. D at 1). In an undated attachment to the OIP

Response, the EOUSA admitted that it had failed to locate the file for the First FOIA Request. (Flores Decl., Ex. D at 2). Plaintiff notes that the OIP Remand Memo does not say that the EOUSA could not find the First FOIA Request. The exact wording is : "EOUSA's failure to locate the request file." (Flores Decl., Ex. D at 2). Moreover, the OIP Remand Memo instructed EOUSA to "reopen this file." (Flores Decl., Ex. D at 2). At the time of OIP informed Plaintiff's Counsel that Plaintiff could commence litigation, the DOJ was obligated to preserve evidence. *See* 28 eCFR § 16.9. As stated, the DOJ had not produced any records or sent Plaintiff any correspondence. There were no known documents in the request file for the First FOIA Request, excepting for the First FOIA Request. The DOJ was bound by its own FOIA regulations : "Records shall not be disposed of or destroyed while they are the subject of a pending request, appeal, or lawsuit under the FOIA." *See* 28 eCFR § 16.9. Yet, the Court has not asked the DOJ to account for what happened to the "request file." (Flores Decl., Ex. D). (PL 56.1 Answer at ¶ 17h). These and other facts are not available to the Court or to Plaintiff. (Flores Decl. ¶ 4). The DOJ must account for what it did with the "request file."

The DOJ has never accounted for all the time that the DOJ failed to release "any records that are responsive to Plaintiff's FOIA request at issue in this action" and had "not yet provided an explanation to Plaintiff," as of the filing of the DOJ's Answer in this action. (Dkt. 9 ¶ 27). "Several courts have held that destruction of evidence in violation of a regulation that requires its retention can give rise to an inference of spoliation," adding that for a duty to preserve evidence to attach, "the party seeking the inference must be a member of the general class of persons that the regulatory agency sought to protect in promulgating the rule." *Byrnie*, 243 F.3d. at 109 (omitting citations). *Byrnie* was a case under Connecticut state FOIA law. Under FOIA, agencies must promptly provide a response to requests for documents, duly made, or to provide justification why the documents may be exempt from production. 5 U.S.C. § 552. Therefore, the DOJ is not in compliance with FOIA, and the DOJ is escalating its lack of compliance. For its destruction of the First FOIA Request or the "request file" (whichever the case may be), for its lack of explanation, for the spoliation of the request file for the First FOIA

Request, for the redaction of records, for the entry of suspect documents into evidence, and for the totality of the acts of bad faith, the DOJ must be assessed sanctions and penalties.

D. The DOJ must disclose all records of the prosecution of activists, including answering the Second FOIA Request

It should be clear to the Court that the DOJ did not conduct a comprehensive search at the U.S. Attorney's Office for the District of Columbia for responsive records. Under FOIA, the Government is obligated to release a "general index of records" of records "which, because of the nature of their subject matter, the agency determines have become or are likely to become the subject of subsequent requests for substantially the same records." *See* 5 U.S.C. § 552(a)(2)(D), (E). Furthermore, under the DOJ's own FOIA regulations, "Each component is responsible for determining which of its records are required to be made publicly available, as well as *identifying additional records of interest to the public that are appropriate for public disclosure*, and for posting and indexing such records" (emphasis added). *See* 28 eCFR § 16.2. FOIA is not ambiguous about the Government's obligation to disclose duly requested records. However, the Government refuses to comply with FOIA.

The first sub-item under request 1 of the First FOIA Request asked for records that would identify : "what kind of activists may be targeted for prosecution, how many activists have been targeted for prosecution, what are the names of such activists, and which Department of Justice officials approved of such prosecution of activists." (Dkt. No. 12 at Ex. I to Ex. C). (PL 56.1 Answer ¶ 8a(i)). When the EOUSA produced the Red Herring Response, the EOUSA had said it had not found any responsive records to the First FOIA Request. (Flores Decl., Ex. F at 1). Plaintiff provided examples of names of activists, who had been prosecuted for their activism, in Plaintiff's Index of References to Records Requested under FOIA Request to make it easier for the DOJ to locate and produce the records requested in the first sub-item under request 1 of the First FOIA Request. Yet, when the Court issued its Omnibus Order suggesting that the DOJ produce at least some of the records on Plaintiff's Index of References to Records

Requested under FOIA Request, the Court may have given the DOJ the wrong impression about producing records in respect of the first sub-item under request 1 of the First FOIA Request. Plaintiff has duly requested records that would identify : "what kind of activists may be targeted for prosecution, how many activists have been targeted for prosecution, what are the names of such activists, and which Department of Justice officials approved of such prosecution of activists." (Dkt. No. 12 at Ex. I to Ex. C). (PL 56.1 Answer ¶ 8a(i)). The DOJ should produce all records that are responsive to this specific request and not just some. Furthermore, when Plaintiff requested a *Vaughn* Index of the privacy-encumbered records withheld by the DOJ from the Red Herring Response, the Government never provided the *Vaughn* Index. (Dkt. No. 12, Ex. A at 2, B at ¶ 46). (Flores Decl., Ex. I at ¶ 4j(i)-(ii)). (PL 56.1 Answer at ¶ 8.1e).

It is unfortunate that the DOJ's pattern and practise of violating FOIA has forced the Court to review Plaintiff's routine due diligence requests, but now Plaintiff asks the Court to compel the DOJ to address Plaintiff's Due Diligence Letter in its entirety. (Flores Decl., Ex. I). Lastly, because the DOJ intentionally misrepresented that the Civil Rights Division was a component of the DOJ that had its own Criminal Division, the DOJ must conduct a search for records at the Criminal Division of the Civil Rights Division and answer the Second FOIA Request. It is all the more imperative for the DOJ to conduct a search of the Civil Rights Division, because, under FOIA, agencies are supposed to disclose duly requested records not subject to Exemptions. Nowhere under FOIA is an agency allowed to make disclosures of records at its discretion.

E. If FOIA does not permit sanctions and penalties, then the Court must impose sanctions and penalties under the First Amendment to guard against prior restraint of the press.

Plaintiff's Request seeks records about how the DOJ balances First Amendment rights, other Constitutional rights, civil liberties, and other civil rights of activists against charges that the DOJ brings against activists. As a journalist, Plaintiff seeks these

records in order to inform the public.[17] (Dkt. 15 at ¶ 58). Demonstrating the danger to the First Amendment, the government precludes the full exercise of complete speech by restricting the public to engage in speech that lacks information in the records sought by the Free Speech FOIA Requests filed under FOIA by Plaintiff and constitutes prior restraint, which is unconstitutional. *Near v. Minnesota*, 283 U.S. 697 (1931).

The DOJ has acknowledged in proceedings before this Court that for two years it neither released records nor explained its failure to release records. (Dkt. No. 9 at ¶ 27). To delay the DOJ's production of records responsive to the First FOIA Request, the DOJ has *fabricated a fairy tale* that it could not locate the First FOIA Request, even though it has been shown that George had a copy of the First FOIA Request all along. (PL 56.1 Answer ¶ 12). (Dkt. No. 9 at ¶ 4, 29 and Dkt. No. 12 at 2-3). To further interfere with the production of records, George has claimed that she has no "manual" that applies to the prosecution of activists. (Kelly Decl. ¶ 18). The DOJ would later reveal that some of the guidelines that Plaintiff was seeking came from the United States Attorneys' Manual. (Flores Decl., Ex. G at Tabs D, E, and G). *See, e.g., U.S. Dep't of Justice*, United States Attorneys' Manual § 9-65.880-82. The only records for which the DOJ has claimed an Exemption are the Exempted Records from the Red Herring Response. (Dkt. 12, Ex. A, B at ¶ 46). (Flores Decl., Ex. I at ¶ 4j(i)-(ii)). (PL 56.1 Answer at ¶ 97). Plaintiff has requested a *Vaughn* Index for the Exempted Records, but not only does the DOJ refuse to produce the *Vaughn* Index, but the DOJ refuses to even acknowledge Plaintiff's request. (Singh Decl., Ex. N). The first sub-item under request 1 of the First FOIA Request asked for records that would identify : "what kind of activists may be targeted for prosecution, how many activists have been targeted for prosecution, what are the names of such activists, and which Department of Justice officials approved of

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17 In response to Defendant's restrictions on speech, Plaintiff has produced YouTube videos to inform the public about the Government's refusal to answer the First FOIA Request. *See*, e.g., LGBTcivilRIRGHTS, *Why won't DOJ answer FOIA Request about Lt. Dan Choi ?*, YouTube (Oct. 15, 2013), https://youtu.be/JfqJ8FncI9Q ; astoria25, *Free Speech Implications of DOJ Denying FOIA Request on Lt. Daniel Choi*, YouTube (Dec. 4, 2013), https://youtu.be/axxpXab1ZVQ ; Louis Flores, *Protest against Eric Holder at NYU re: FOIA request about government prosecution of activists*, YouTube (Sept. 17, 2014), https://youtu.be/3HQ--oRpmK8.

such prosecution of activists." (Dkt. No. 12 at Ex. I to Ex. C). (PL 56.1 Answer ¶ 8a(i)). Plaintiff has performed due diligence and produced Plaintiff's Index of References to Records Requested under FOIA Request. (PL 56.1 Answer ¶ 40). Plaintiff has served the Plaintiff's Index of References to Records Requested under FOIA Request on Defense Counsel. (PL 56.1 Answer ¶ 40). FOIA requires disclosure of all agency records at the request of the public, unless the records fall within one of nine narrow Exemptions. *See* 5 U.S.C. § 552(b).

If it can be shown that the DOJ has more records or *Vaughn* Indexes to disclose, contrary to the misrepresentations that the DOJ has made before this Court, then that means that the DOJ has been acting in bad faith and must be found in contempt and face sanctions and penalties. If there is one more record or *Vaughn* Index released that is answerable to the First FOIA Request, the Second FOIA Request, or to Plaintiff's Due Diligence Letter, which have hereto before been denied to Plaintiff, not just during the time of the proceedings before this Court, but also during the two years when the DOJ provided no "explanation" to Plaintiff for its violation of FOIA, then that means that the DOJ was gambling that the *pro se* Plaintiff would not be able to manage the litigation and dispositive motion proceedings before this Court in order to receive and collect those records or *Vaughn* Indexes, and the DOJ's loss or destruction of the "request file" for the First FOIA Request would work in its favour by not being able to provide Plaintiff the evidence and documents needed to sufficiently oppose the DOJ's motion for summary judgment. If it can be shown that the DOJ has more records to disclose and more *Vaughn* Indexes to produce, then the DOJ would be demonstrating, *ipso facto*, that it has been keeping with its pattern and practice of violating FOIA with impunity during these very Court proceedings, that the DOJ's refusal to answer Plaintiff's Due Diligence Letter and, instead, its eagerness to proceed with dispositive motion practice was premature and a waste of the Court's time. For these acts and for its pattern and practice of bad faith acts and misrepresentations, the DOJ must face sanctions and penalties as a consequence.

Given the adverse First Amendment implications of the DOJ's actions, the Court must exercise its discretion over the DOJ and assess sanctions and penalties. The importance of disclosure in non-FOIA actions has been noted in courts to such an extent that even the assessment of sanctions has been validated in order to guarantee an open government. "To enforce a disclosure requirement of certain speech, the government must have the ability to punish its nondisclosure. If there were no punishment for nondisclosure," violators of disclosure "would have no incentive to disclose until the enforcer of the statute prosecuted him or obtained an injunction. That would render any disclosure requirement so arduous to enforce that it would be ineffective." *Asgeirsson v. Abbott*, 696 F.3d 454, 463 (5th Cir. 2012), cert. denied 133 S.Ct. 1634 (2013). In *Asgeirsson*, public officials faced criminal sanctions for violating the tenants of an open meetings law.

CONCLUSION

Plaintiff has been trying to determine whether the Government has been retaliating against citizens, who engage in speech that is critical of the Government. Based on the acts of the Government, the Government has been trying to keep secret whether the Government is retaliating against activists, who are critics of the Government. For over two years, despite promises made in response to the FOIA Appeal, the Government never answered the First FOIA Request. The DOJ never answered the Congressional Request. In its filing of the Answer at the commencement of this action, the DOJ admitted that it never provided an "explanation" to Plaintiff for its failure to comply with FOIA. During the misconduct that has included making misrepresentations before this Court, the production of the Red Herring Release, the altering of representations made before this Court without explanation, the unexplained redaction of records, the unexplained spoliation of the request file for the First FOIA Request, the production of inferior Declarations by inexperienced Declarants that documented bad faith searches for records, the introduction of at least one suspect

document into evidence, and the interference with government administration by George and/or others, the DOJ does not inspire credibility *based on the evidence*.

In *Vaughn*, the Court found that :

> "This lack of knowledge by the party seeing disclosure seriously distorts the traditional adversary nature of our legal system's form of dispute resolution. Ordinarily, the facts relevant to a dispute are more or less equally available to adverse parties. In a case arising under the FOIA this is not true, as we have noted, and hence the typical process of dispute resolution is impossible. In an effort to compensate, the trial court, as the trier of fact, may and often does examine the document *in camera* to determine whether the Government has properly characterized the information as exempt. Such an examination, however, may be very burdensome, and is necessarily conducted without benefit of criticism and illumination by a party with the actual interest in forcing disclosure." *Vaughn v. Rosen*, 484, F.2d 820, 824-25.

If *in camera* inspection of records is not a reasonable cure or remediation of the DOJ's violations of FOIA, Plaintiff respectfully requests that the Court consider appointing a monitor to conduct the searches for records responsive to the Free Speech FOIA Requests. Otherwise, there is no guarantee that any representations made by the DOJ in future Declarations can be trusted, based on the DOJ's ongoing misconduct.

Furthermore, it must be noted that it wasn't until Plaintiff prepared an index of the Red Herring Response and prepared another index of records, which referred to the records that Plaintiff was seeking, did the DOJ face the Court's written recommendation in the Omnibus Order to produce at least "some" of the records responsive to the First FOIA Request. From the inception of the production of some, admittedly nonresponsive records, Defendant has refused to provide an accounting of the search results according to the line-items listed on the First FOIA Request. The DOJ, in the cover letter transmitting the Red Herring Response, did not make a line-item accounting of each item requested in the First FOIA Request. (Flores Decl., Ex. F at 1-2). In contrast, the DOJ provided some responsive records in accordance to a select few line-items in response to Plaintiff's Index of References to Records Requested under FOIA Request. (Flores Decl., Ex. G). It would be *clearly erroneous* if the Court did not look at the many ways that the DOJ has acted in bad faith and make a determination about the DOJ's lack of credibility in these proceedings, principally in accordance to the DOJ's incorrect

claims that it can comply with FOIA at its discretion, that it is only obligated to produce "some" of the duly requested records, and that it does not have to fully account for all the line-items in the First FOIA Request. Now that Plaintiff has reviewed the FOIA responses and conducted due diligence on the few responsive documents produced, the Government has shut down all efforts to provide clarification or missing documents or redacted information, including failing to provide any index of any records that "are likely to become the subject of subsequent requests for substantially the same records," as provided in FOIA.

Now, therefore :

(1). The Court must find that, *based on the evidence*, the DOJ lacks credibility in the proceedings before this Court and that, despite the Government's acts of bad faith, the DOJ must immediately take steps to comply with FOIA.

(2). The Government must provide the "explanation" that it has been denying Plaintiff in respect of the lost or destroyed "request file" for the First FOIA Request, including the outcome of the FOIA Appeal.

(3). To explain what happened to the "request file" and the FOIA Appeal in respect of the First FOIA Request, the DOJ must provide a Declaration from DOJ officials, like Sola, Whitaker, and George, who were involved or were likely involved with aspects of the First FOIA Request prior to the commencement of this action before this Court.

(4). Based on the pattern and practise of denying FOIA requests and the pattern and practise of bad faith acts, misrepresentations, and the DOJ's resistance to providing or preserving evidence, this Court must impose sanctions and penalties on the DOJ, including, but not limited to :

(a). impose sanctions and penalties in an amount at the Court's discretion, but not less than $1 million, that will be donated to a non-profit government transparency group, to deter the DOJ from

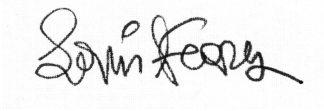
destroying evidence in the future and to encourage the DOJ to resume compliance with FOIA; and/or

(b). appoint for a period of three (3) years over the DOJ a monitor, who will supervise efforts to bring the DOJ into compliance with FOIA in respect of this action and all other FOIA requests, with a charge that the monitor will report back to this Court on progress on such efforts ; and/or

(c). at the Court's discretion, to alternatively enter for a period of three (3) years into a Deferred Sanctions Agreement with the DOJ, such that this Court will assess sanctions and penalties on the DOJ and appoint a monitor over the DOJ if the DOJ continues to violate FOIA and the orders of this Court during these proceedings before this Court and any other similar and future proceedings before this Court ; and/or

(d). refer any determinations of misconduct to relevant bar associations, or other regulatory bodies, as appropriate.

Respectfully submitted,



_____

Dated : Jackson Heights, New York
January 5, 2015

Louis Flores
34-21 77th Street, Apt. 406
Jackson Heights, NY 11372
Phone : (646) 400-1168
louisflores@louisflores.com
Pro Se Plaintiff

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

LOUIS FLORES,

Plaintiff,

v.

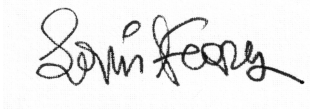
UNITED STATES DEPARTMENT OF JUSTICE,

Defendant.

15-CV-2627 (JG)(RLM)

AFFIRMATION OF SERVICE

I, **LOUIS FLORES**, declare under penalty of perjury that I have served a copy of the attached **PLAINTIFF'S RULE 52 MOTION AND MOTION FOR A PRELIMINARY INJUNCTION** and **MEMORANDUM IN SUPORT OF PLAINTIFF'S RULE 52 MOTION AND MOTION FOR A PRELIMINARY INJUNCTION** upon **RUKHSANAH L. SINGH**, whose address is : c/o United States Attorney's Office, Eastern District of New York, 271 Cadman Plaza East, 7th Floor, Brooklyn, New York 11201 by **ELECTRONIC MAIL DELIVERY** to : rukhsanah.singh@usdoj.gov.



Dated : Jackson Heights, New York
January 5, 2015

Louis Flores
34-21 77th Street, Apt. 406
Jackson Heights, New York 11372
Phone : (646) 400-1168
louisflores@louisflores.com

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

LOUIS FLORES, *Plaintiff*, v. UNITED STATES DEPARTMENT OF JUSTICE, *Defendant*.	15-CV-2627 (JG)(RLM)

DECLARATION OF LOUIS FLORES

I, LOUIS FLORES, the *pro se* Plaintiff, declare as follows :

1. I am a journalist and an activist. I publish the online news Web site, Progress Queens. I also maintain and own several political and activist blogs on the Internet. I filed the First FOIA Request, as defined in the accompanying pleadings, on 30 April 2013, with the Defendant United States Department of Justice (the "DOJ"). I filed the Second FOIA Request with the Civil Rights Division of the DOJ on 20 October 2015 in an effort to "close the loop" on the records being requested from the DOJ. For over two years, I have done everything from filed requests under the Freedom of Information Act ("FOIA") to asking my Congressman to intercede with the DOJ on my behalf to launching a protest campaign – protesting in front of former U.S. Attorney General Eric Holder himself – all in a failed effort to get the DOJ to respond to the First FOIA Request. I have exhausted all remedies available to me, and the discretion of the Court will determine whether the DOJ will comply with FOIA and release the duly requested records sought by Plaintiff. As such, I am familiar with the facts, the information, the documents, and all other materials presented by Plaintiff in this action concerning this litigation.

2. I ratify as facts all of the statements made by Plaintiff in the Amended Complaint, particularly, but without exclusivity, all of the statements pertaining to Plaintiff's efforts to negotiate with the DOJ for the release of records responsive to the First FOIA Request. (Dkt. No. 15).

3. Except for minor and reasonable allowances for typographical errors, I ratify as facts all of the statements made by Plaintiff in all of the documents filed by Plaintiff in the docket with this Court, and I attest to all documents filed by Plaintiff in the docket with this Court as true and correct copies of such documents.

4. Plaintiff declares that there are no facts entered into evidence about each of :

A. What did the DOJ do with the First FOIA Request in the time before Plaintiff filed the Complaint in this action ;

B. What did the DOJ do with the FOIA Appeal in the time before Plaintiff filed the Complaint in this action ;

C. What did the DOJ do with the OIP Remand Memo in the time before Plaintiff filed the Complaint in this action ;

D. What did Sanjay Sola, Sonya Whitaker, and Assistant U.S. Attorney Angela George do about conducting searches for responsive records in the time before Plaintiff filed the Complaint in this action ;

E. The log kept by the DOJ for FOIA requests ;

F. What did the DOJ do about locating the request file for the First FOIA Request ;

G. What did the DOJ do about checking its compliance procedures after it noticed that it misplaced a request file for the First FOIA Request ;

H. What was in the request file for the First FOIA Request at the time that the request file allegedly went missing ;

I. Why did Assistant U.S. Attorney Angela George never communicate with a DOJ official that she had a copy of the First FOIA Request all along ?

J. If Plaintiff was communicating with Sanjay Sola and Sonya Whitaker, and each of Sanjay Sola and Sonya Whitaker were communicating with each other, about the First FOIA Request, how could the DOJ misplace the

First FOIA Request ? How were Sanjay Sola and Sonya Whitaker reviewing the First FOIA Request in 2013, if the DOJ did not have a copy of the First FOIA Request ?

K. What are the occupational experiences, the employment histories, and the expertise with the documents being request of the Declarants Karin Kelly and Principa Stone ?

L. Why are Sanjay Sola, Sonya Whitaker, and Assistant U.S. Attorney Angela George not providing Declarations on behalf of the DOJ ?

M. Why did the DOJ not provide a line item accounting for the First FOIA Request ?

N. Did Sanjay Sola or Sonya Whitaker ever contact Assistant U.S. Attorney Angela George for a conduct of records at any time before Plaintiff filed the Complaint in this action ?

O. Declarants Karin Kelly and/or Principa Stone knew to consult with Assistant U.S. Attorney Angela George in the production of the Declarations, but did Declarants Karin Kelly and/or Principa Stone know to consult with Sanjay Sola and Sonya Whitaker ?

P. There is no documentation in the Declarations about the search of paper files for the production of any of the responsive or non-responsive documents in respect of the First FOIA Request.

5. This declaration and the exhibits annexed hereto submitted in support of Plaintiff's opposition motion and Plaintiff's cross-motion for sanctions are true copies of the documents in possession of Plaintiff.

A. Attached hereto as Exhibit A is a true and correct copy of : the e-mail transmitting the FOIA Appeal prepared by Plaintiff's Counsel and the FOIA Appeal, each dated 6 December 2013.

B. Attached hereto as Exhibit B is a true and correct copy of : the Congressional Request, dated 10 February 2014, sent by the Hon. U.S. Representative Joseph Crowley, on Plaintiff's behalf, to the DOJ, asking the DOJ to respond to the First FOIA Request.

C. Attached hereto as Exhibit C is a true and correct copy of : an e-mail, dated 19 March 2014, sent by an attorney at Plaintiff's Counsel to Plaintiff, informing Plaintiff that the DOJ would be answering the First FOIA Request within "2-3 weeks."

D. Attached hereto as Exhibit D is a true and correct copy of : the OIP Response, dated 20 May 2014, and the undated OIP Remand Memo.

E. Attached hereto as Exhibit E is a true and correct copy of : an e-mail, dated 9 June 2014, that transmitted from an attorney at Plaintiff's Counsel to Plaintiff the copies of the OIP Response and the OIP Remand Memo.

F. Attached hereto as Exhibit F is a true and correct copy of : the Red Herring Response, provided under cover letter, dated 19 August 2015, from the EOUSA to Plaintiff.

G. Attached hereto as Exhibit G is a true and correct copy of : the Second FOIA Response, provided under cover letter, dated 13 October 2015, from Defense Counsel to Plaintiff.

H. Attached hereto as Exhibit H is a true and correct copy of : the "no records letter" signed by Defense Counsel and addressed to Plaintiff, provided in lieu of a Declaration in respect of a search conducted at Main Justice.

I. Attached hereto as Exhibit I is a true and correct copy of : Plaintiff's Due Diligence Letter, dated 26 October 2015, addressed to Defense Counsel, inclusive of the Second FOIA Request, dated 20 October 2015.

J. Attached hereto as Exhibit J is a true and correct copy of : Defense Counsel's letter, dated 03 November 2015, sent to Plaintiff in response to Plaintiff's Due Diligence Letter, inclusive of its attachment.

K. Attached hereto as Exhibit K is a true and correct copy of : Plaintiff's letter, dated 04 November 2015, and addressed to Defense Counsel, questioning the DOJ's commitment to defending the public interest, inclusive of its attachment.

L. Attached hereto as Exhibit L is a true and correct copy of : Plaintiff's Index of References to Records Requested under FOIA Request, which was served by Plaintiff on Defense Counsel at the Initial Conference.

M. Exhibit M is reserved.

N. Exhibit N is reserved.

O. Attached hereto as Exhibit O is a true and correct copy of : a page from the White House's Web site, "President Obama Delivers a Statement on the Ferguson Grand Jury's Decision."

P. Attached hereto as Exhibit P is a true and correct copy of : an online news report published by CNN, "Ferguson fallout : Protesters interrupt Holder's Speech."

Q. Attached hereto as Exhibit Q is a true and correct copy of : an online news report published by *The Huffington Post*, "#BlackLivesMatter Activists in St. Louis Charged With Disruption On Federal Property."

R. Attached hereto as Exhibit R is a true and correct copy of : an online news report published by *The New York Times*, "What an Uncensored Letter to M.L.K. Reveals," inclusive of a screen capture of the referenced letter.

S. Attached hereto as Exhibit S is a true and correct copy of : an online news report published by *Mother Jones*, "Check Out This FBI Memo Citing John Lennon's 'Revolutionary Activities.' "

T. Attached hereto as Exhibit T is a true and correct copy of : an online report by California Healthline, "AIDS/HIV: ACT UP Rallies Against Bush at RNC Headquarters."

U. Attached hereto as Exhibit U is a true and correct copy of : an online news report published by *Rolling Stone*, "Why Are Homeowners Being Jailed for Demanding Wall Street Prosecutions ?"

V. Attached hereto as Exhibit V is a true and correct copy of : an online news report published by Daily Kos, "Updated : Judge Allows Lt Dan Choi's 'vindictive prosecution' Defense."

W. Attached hereto as Exhibit W is a true and correct copy of : an online news report published by *The New York Times*, "A Data Crusader, a Defendant and Now, a Cause."

X. Attached hereto as Exhibit X is a true and correct copy of : an online news report published by *Wired*, "Congress Demands Justice Department Explain Aaron Swartz Prosecution," inclusive of a referenced letter, dated 28 January 2013, sent by members of Congress to the DOJ.

Y. Attached hereto as Exhibit Y is a true and correct copy of : an online news report published by *U.S. News & World Report*, "Barrett Brown's Prison Time Raises Cybersecurity, Journalism Concerns."

Z. Attached hereto as Exhibit Z is a true and correct copy of : an online news report published by *The Washington Post*, "Activists cry foul over FBI probe."

AA. Attached hereto as Exhibit AA is a true and correct copy of : an online news report published by *The Huffington Post*, "HIV/AIDS Activists Complain Of Unfair Treatment By U.S. Attorney's Office."

BB. Attached hereto as Exhibit BB is a true and correct copy of : an online news report published by *Mother Jones*, " 'Most Transparent Administration Ever' Is Still Not."

CC. Attached hereto as Exhibit CC is a true and correct copy of : a letter, dated 04 February 2013 sent by members of Congress to the DOJ.

DD. Attached hereto as Exhibit DD is a true and correct copy of : an online report published by The National Press Club, "National Press Club asks President Obama to fulfill FOIA promises."

EE. Attached hereto as Exhibit EE is a true and correct copy of : an online news report published by POLITICO, "NYT, Vice, Mother Jones top FOIA suits."

FF. Attached hereto as Exhibit FF is a true and correct copy of : an online news report published by The Associated Press, "Administration sets record for withholding government files."

GG. Attached hereto as Exhibit GG is a true and correct copy of : a tweet by *The New York Times* journalist Charles Savage published on Twitter, "FOIA lets an agency omit embarrassing doc & when caught delay its disclosure by 7 more months goo.gl/wCT2Dz."

HH. Attached hereto as Exhibit HH is a true and correct copy of : an online news report published by Shadow Proof, "Emails Reveal White House Alerted Secret Service To Dan Choi, GetEQUAL Protests In November 2010."

II. Attached hereto as Exhibit II is a true and correct copy of : an online news report published by Tech Dirt, "DOJ Has Blocked Everyone In The Executive Branch From Reading The Senate's Torture Report."

JJ. Attached hereto as Exhibit JJ is a true and correct copy of : Plaintiff's e-mail, dated 30 April 2013, to William.Miller3@usdoj.gov with a cc : to each of AskDOJ@usdoj.gov, Angela.George@usdoj.gov, Gilberto.Guerrero@usdoj.gov, mary.mccord@usdoj.gov, stratton.strand@usdoj.gov, roy.mcleese@usdoj.gov, Lori.Buckler@usdoj.gov, Victoria.Ashton@usdoj.gov, press@ltdanchoi.org, Tommy News <tommysnews@gmail.com>, Louis Flores <louisflores@louisflores.com>, and Louis Flores <lflores22@gmail.com>, inclusive of the First FOIA Request, which was attached.

KK. Attached hereto as Exhibit KK is a true and correct copy of : an online report published by The FOIA Project, "FOIA Lawsuits Increase During Obama Administration."

LL. Attached hereto as Exhibit LL is a true and correct copy of : an online news report published by Courthouse News Service, "Justice Dept. Accused of Sabotaging FOIA."

MM. Attached hereto as Exhibit MM is a true and correct copy of : Defense Counsel's e-mail, dated 13 October 2015, to Plaintiff, attached to which was Defense Counsel's cover letter, dated 13 October 2015, with no attachments cited in Defense Counsel's cover letter.

NN. Attached hereto as Exhibit NN is a true and correct copy of : an e-mail from an attorney at Plaintiff's Counsel to Plaintiff, dated, 14 December 2015, attesting to the DOJ's never asking the attorney for a replacement copy of the First FOIA Request, inclusive of attachments (the OIP Response and the OIP Remand Memo).

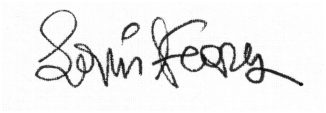
OO. Attached hereto as Exhibit OO is a true and correct copy of : the Certified Mail Return Receipt, signed (stamped) and dated 06 May 2013, evidencing the DOJ's receipt of the First FOIA Request.

PP. Attached hereto as Exhibit PP is a true and correct copy of : the e-mail, dated 20 December 2013, from the OIP to an attorney at Plaintiff's Counsel, transmitting the OIP Acknowledgement, dated 20 December 2013, of the FOIA Appeal.

QQ. Exhibit QQ is reserved.

RR. Attached hereto as Exhibit RR is a true and correct copy of : an e-mail, dated 01 May 2013, from William Miller, the Public Information Officer for the U.S. Attorney's Office for the District of Columbia, acknowledging receipt of the First FOIA Request.

In accordance with 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief. Executed on 05 January 2016 (Jackson Heights, Queens).



Louis Flores
34-21 77th Street, Apt. 406
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Phone : (646) 400-1168
louisflores@louisflores.com
Pro Se Plaintiff

TO : [By ECF and e-mail to : rukhsanah.singh@usdoj.gov]

Rukhsanah L. Singh, Assistant U.S. Attorney
U.S. Attorney's Office - Eastern District of New York
271 Cadman Plaza East, 7th Floor
Brooklyn, NY 11201
Attorney for Defendant

Flores Decl., Ex. JJ

Gmail by Google

Louis Flores <lflores22@gmail.com>

USA v. Lt. Daniel Choi - FOIA Request

LF (g-Male) <lflores22@gmail.com> Tue, Apr 30, 2013 at 9:23 PM
To: "Miller, William (USADC)" <William.Miller3@usdoj.gov>
Cc: AskDOJ@usdoj.gov, Angela.George@usdoj.gov, Gilberto.Guerrero@usdoj.gov, mary.mccord@usdoj.gov, stratton.strand@usdoj.gov, roy.mcleese@usdoj.gov, Lori.Buckler@usdoj.gov, Victoria.Ashton@usdoj.gov, press@ltdanchoi.org, tommysnews@gmail.com, lflores22@gmail.com, Louis Flores <louisflores@louisflores.com>

Dear Mr. Miller :

I have submitted my FOIA request today by certified mail, return receipt requested.

Attached is a courtesy copy of a .pdf scan of my request. It is modeled on a request submitted by the ACLU, so I reference many regulations.

Note my requests for expedited processing and my application for waiver or limitation of fees.

If you have any questions, please feel free to contact me.

Thank you kindly.

Louis Flores
lflores22@gmail.com
louisflores@louisflores.com
1 (646) 400-1168

On 17 avr. 2013, at 10:32, Miller, William (USADC) wrote:

> Mr. Flores: Thank you for your request for information concerning the case involving Daniel Choi.
>
> A FOIA request for records from a U.S. Attorney's Office should be sent to the Department of Justice's Executive Office for United States Attorneys (EOUSA). EOUSA is the official record keeper for the records maintained in all United States Attorneys' offices, and will respond to your request directly
>
> The address is as follows:
>
> Department of Justice
> EOUSA/FOIA/PA Staff
> BICN Bldg.
> 600 E Street, N.W., Suite 7300
> Washington, D.C. 20530-0001
>
> The telephone number is (202) 252-6020.

Bill Miller
Public Information Officer
U.S. Attorney's Office for the District of Columbia
202-252-6643 (Direct)
202-252-6933 (Main)
william.miller3@usdoj.gov

2013-04-30-Lt-Daniel-Choi-DOJ-FOIA-Request-Louis-Flores.pdf
10510K

Louis Flores
70A Greenwich Ave., No. 342
New York, New York 10011
louisflores@louisflores.com
1 (646) 400-1168

30 April 2013

Department of Justice
EOUSA/FOIA/PA Staff
BICN Bldg.
600 E Street, N.W., Suite 7300
Washington, D.C. 20530-0001

Ladies and Gentlemen :

Re : REQUEST UNDER FREEDOM OF INFORMATION ACT/ Expedited Processing Requested

This letter constitutes a request ("Request") pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 *et seq.*, the Department of Justice implementing regulations, 28 C.F.R. § 16.1 *et seq.*, the President's Memorandum of January 21, 2009, 74 Fed. Reg. 4683 (Jan. 26, 2009), and the Attorney General's Memorandum of March 19, 2009, 74 Fed. Reg. 49,892 (Sept. 29, 2009). I submit this Request as a blogger.

This Request seeks records pertaining to the prosecution of Lt. Daniel Choi ("Lt. Choi"). Lt. Choi was arrested on Nov. 15, 2010 on a public sidewalk adjacent to the White House, during a protest against the military's former policy known as "Don't Ask, Don't Tell." On March 27, 2013, I submitted a request for information in an e-mail addressed to Angela George of the U.S. Attorney's Office (attached hereto as Exhibit A) ("Original Request") requesting various information and records pertaining to the prosecution of Lt. Choi. Other officers with the Department of Justice were also copied on this e-mail. I specifically mentioned in my Original Request that I requested answers to my questions, or, if there was another process, which I had to follow to submit an "official" request for information, I alternatively requested that I be informed by the U.S. Attorney's Office of such process. The U.S. Attorney's Office was non-responsive to this e-mail, so I sent a follow-up e-mail on April 10, 2013 (attached hereto as Exhibit B). The U.S. Attorney's Office was non-responsive to this e-mail, so I forwarded the e-mail chain of my requests for information and records on April 16, 2013 to a general e-mail inbox for the Department of Justice (attached hereto as Exhibit C), to which I finally received an acknowledgement and further instruction dated April 17, 2013 (attached hereto as Exhibit D), which gives rise to this Request.

This Request seeks information and records pertaining to the nature and purpose of the U.S. Attorney's Office's prosecution of Lt. Choi. Many activists question why the Department of Justice has sought to prioritise the prosecution of activists, such as the late Aaron Swartz and Lt. Choi. Are prosecutors being told to prosecute activists ? The nature of some of the prosecutions of activists have been portrayed in the press to be "rife with intimidation and prosecutorial overreach." *See, e.g.*, Noam Cohen, *A Data Crusader, a Defendant and Now, a Cause*, N.Y. Times, Jan. 14, 2003, at A1. Given this prosecutorial tone, has there been any intention to express disrespect to Lt. Choi during the proceedings of the prosecution ? What explains why the U.S. Attorney's Office refused to address Lt. Choi by his official military rank ? How aggressive were prosecutors instructed to pursue Lt. Choi ? What have been the cumulative costs of the prosecution of Lt. Choi ?

In several press reports, the Department of Justice was portrayed to be engaged in a "vindictive prosecution" against Lt. Choi. *See, e.g.*, Scott Wooledge, *Updated: Judge Allows Lt Dan Choi's "vindictive prosecution" Defense*, Daily Kos, (Aug. 31, 2011), http://www.dailykos.com/story/2011/08/31/1012290/-Updated-Judge-Allows-Lt-Dan-Choi-s-vindictive-prosecution-Defense#. And then, before the nature and purpose of the selective prosecution of Lt. Choi could become public information, prosecutors quashed the effort to expose the selective prosecution. *See* Lou Chibbaro Jr., *Judge rules against Choi in 'vindictive' prosecution claim*, Washington Blade (Oct. 17, 2011), http://www.washingtonblade.com/2011/10/17/judge-rules-against-choi-in-'vindictive'-prosecution-claim/.

Further reports suggest prosecutorial overreach or vindictive prosecution is not limited to the late Mr. Swartz or to Lt. Choi. The scope of other prosecutions, namely, the prosecution of PFC Bradley Manning, could lead to treating all whistleblowers as traitors. This treatment has been described as "extraordinary prosecutorial overkill." *See* Amy Goodman & Glenn Greenwald, *Glenn Greenwald on Bradley Manning: Prosecutor Overreach Could Turn All Whistleblowing into Treason*, Democracy Now (March 5, 2013), http://www.democracynow.org/2013/3/5/glenn_greenwald_on_bradley_manning_prosecutor.

Despite these publicized concerns, the Department of Justice remains silent about its intentions with respect of its prosecution of activists. Indeed, the U.S. Attorney's Office was non-responsive to my Original Request. It is unclear why federal prosecutors are persecuting activists. The public has little information about the internal accountability mechanisms by which laws and rules govern the targeted prosecutions of activists. Nor does the public have any information about how the

Department of Justice balances First Amendment rights, other Constitutional rights, civil liberties, and other civil rights of activists against the charges that the Department of Justice brings against activists. Without this information, the public is unable to make an informed judgment about the Department of Justice's targeted prosecutions of activists. I make the following requests for information in hopes of filling that void.

I. Requested Records

1. All records and information pertaining to the legal basis of prosecuting activists, who engage in protests, including, but not limited, to records and information regarding :

A. what kind of activists may be targeted for prosecution, how many activists have been targeted for prosecution, what are the names of such activists, and which Department of Justice officials approved of such prosecution of activists ;

B. whether the nature and purpose of prosecution of activists may be aggressive, selective, or involve overreach, and which Department of Justice officials approve of such nature and purpose of prosecution of activists ;

C. limits, rules, procedures, or other guidelines that must or should be taken into consideration before, during, and after the prosecution of activists to mimimise the interference with First Amendment rights, other Constitutional rights, civil liberties, and other civil rights of activists ;

D. consideration of other circumstances, conditions, and restrictions that form any part of the decision to target activists for prosecution ; and, if such considerations exist, under what circumstances, under what conditions, and subject to what restrictions ;

E. any and all agency, executive, judicial, or congressional reports, memoranda, records, and information, which provide any description of the process for the determination as to whether activists can be targeted for prosecution ; and

F. whether agencies other than the Department of Justice may target activists for prosecution, and, if so, under what circumstances, under what conditions, and subject to what restrictions ; and which agency officials approve of such prosecution of activists.

2. All records and information created on or after Nov. 12, 2010, pertaining to the legal basis for the arrest and/or prosecution of Lt. Choi, including, but not limited to, records and information regarding :

   A. whether the prosecution of Lt. Choi was part of any Department of Justice's process to target activists ; and

   B. the limits of the Department of Justice's prosecution to mimimise the interference with First Amendment, other Constitutional rights, civil liberties, and other civil rights of Lt. Choi.

3. All records and information created on or after Nov. 12, 2010, pertaining to the legal basis for the Department of Justice or U.S. Attorney's Office to fail to refer to Lt. Choi by his military rank, in accordance with Army Regulation 670-1.

4. The total cost of the prosecution of Lt. Choi, including, but not limited to :

   A. any and all records and information created on or after Nov. 12, 2010, pertaining to the cost of arresting and/or prosecuting Lt. Choi, including, but not limited to, records and information regarding :

      a. any and all agency, executive, judicial, or congressional reports, memoranda, records, and information, which indicate, calculate, or analyze the budged and actual cost of the prosecution of Lt. Choi ;

      b. any and all records of the cost of staff costs, staff benefits, travel, transcripts, accommodations, meals, non-attorney investigation costs, research costs, other investigation costs, and all other costs on the prosecution of Lt. Choi ;

      c. any and all records of the costs of fact and expert witnesses in connection with the prosecution of Lt. Choi ;

      d. any and all records of assistance provided by other law enforcement agencies in connection with the prosecution of Lt. Choi ; and

      e. any and all records of hours worked, paid or unpaid overtime hours, and other information about personnel hours worked in connection with the prosecution of Lt. Choi.

II. Application For Expedited Processing

I request expedited processing pursuant to 5 U.S.C. § 552(a)(6)(E) ; 22 C.F.R. § 171.12(b) ; 28 C.F.R. § 16.5(d) ; 32 C.F.R. § 286.4(d)(3) ; 32 C.F.R. § 1900.34(c). There is a "compelling need" for these records, because the information requested is urgently needed in order to be disseminated to inform the public about actual or alleged Federal Government activity. 5 U.S.C. § 552(a)(6)(E)(v) ; *see also* 22 C.F.R. § 171.12(b)(2) ; 28 C.F.R. § 16.5(d)(1)(ii) ; 32 C.F.R. § 286.4(d)(3)(ii) ; 32 C.F.R. § 1900.34(c)(2).

In addition, the records sought relate to a "breaking news story of general public interest." 22 C.F.R. § 171.12(b)(2)(i) ; 32 C.F.R. § 286.4(d)(3)(ii)(A) ; *see also* 28 C.F.R. § 16.5(d)(1)(iv) (providing for expedited processing in relation to a "matter of widespread and exceptional media interest in which there exist possible questions about the government's integrity which affect public confidence").

As a blogger, I am "primarily engaged in disseminating information" within the meaning of the statue and regulations. 5 U.S.C. § 552(a)(6)(E)(v)(II) ; 22 C.F.R. § 171.12(b)(2) ; 28 C.F.R. § 16.5(d)(1)(ii) ; 32 C.F.R. § 286.4(d)(3)(ii) ; 32 C.F.R. § 1900.34(c)(2). Dissemination of information to the public is a critical and substantial component of my mission and work. *See, e.g.*, Jonathan Lemire, *Christine Quinn detractors use social media in effort to quash her mayoral run*, N.Y. Daily News (April 14, 2013), http://www.nydailynews.com/news/politics/online-effort-quash-christine-quinn-mayoral-aspirations-article-1.1316224 ; Jill Colvin, *Christine Quinn Foes Prepare Campaign to Spoil Her Mayoral Hopes*, DNAinfo (Jan. 9, 2013), http://www.dnainfo.com/new-york/20130109/new-york-city/christine-quinn-foes-prepare-campaign-spoil-her-mayoral-hopes. I publish several blogs, produce YouTube videos, and manage several Twitter feeds. Such material is widely available to everyone. This Request originated from questions posted to the U.S. Attorney's Office, so that I could update this specific blog post : http://ny-popculture-politics.blogspot.com/2013/03/lt-dan-choi-dadt-trial-update.html.

The records and information sought directly relate to a breaking news story of general public interest that concerns actual or alleged Federal Government activist ; specifically, the records and information sought relate to the U.S. Government's prosecution of activists. The records and information sought will help determine what is the government's asserted legal basis for these targeted prosecutions, whether it conflicts with the First Amendment rights, other Constitutional rights, civil liberties, and other civil rights, how many activists have

been prosecuted, and other matters that are essential in order for the public to make an informed judgment about the advisability of this tactic and the lawfulness of the government's conduct. For these reasons, the records and information sought relate to a "matter of widespread and exceptional media interest in which there exist possible questions about the government's integrity which affect public confidence." 28 C.F.R. § 16.5(d)(1)(iv).

There have been news reports about the prosecution of activists that imposes restrictions, burdens, and interferences with First Amendment, other Constitutional rights, civil liberties, and other civil rights of activists. After HIV/AIDS activists were arrested during a peaceful protest in Washington, DC, the U.S. Attorney's Office demanded the drug-testing of activists, who were charged with nonviolent crimes, such as civil disobedience. The U.S. Attorney's Office demand for drug-testing of HIV/AIDS activists was fraught with complications, because the activists may have had a prescription for medical marijuana or may have had prescriptions for other medications, which perhaps would have resulted in a false positive. *See* Trenton Straube, *U.S. Attorney Requires Drug Tests for AIDS Protesters*, POZ (Feb. 2012), http://www.poz.com/articles/DC_HIV_Marijuana_401_21944.shtml ; Martin Austermuhle, *AIDS Activist Faces Trial After Use of Medical Marijuana Sinks Hopes for Dismissal of Charges*, dcist (Feb. 9, 2012), http://dcist.com/2012/02/aids_activist_faces_trial_after_usi.php.

These news stories and investigative reports have also suggested that the prosecution of activists was unfair. These HIV/AIDS activists chained themselves together inside the office of House Majority Leader Eric Cantor (R-Va.) to protest, among other issues, cuts to HIV/AIDS programs. They were arrested on federal charges. On the same day as the HIV/AIDS activists were arrested, 41 D.C. voting rights activists, including Mayor Vincent Gray, were arrested on Capitol Hill. The voting rights activists were charged with misdemeanors by the D.C. attorney general. Most, including the mayor, paid a $50 fine. What explains why the U.S. Attorney's Office was treating HIV/AIDS activists differently ? *See* Arin Greenwood, *HIV/AIDS Activists Complain Of Unfair Treatment By U.S. Attorney's Office*, Huffington Post (Feb. 8, 2012), http://www.huffingtonpost.com/2012/02/08/aids-activists-protest_n_1263144.html ; Brianne Carter, *D.C. mayor Vincent Gray, councilmembers arrested : Protesters plead not guilty*, WJLA (May 5, 2011), http://www.wjla.com/articles/2011/05/d-c-mayor-vincent-gray-councilmembers-arrested-protesters-to-appear-in-court--60103.html ; Debbie Siegelbaum, *AIDS activists allege discriminatory treatment following Capitol arrest*, The Hill (Feb. 8, 2011), http://thehill.com/homenews/house/209485-aids-activists-allege-discriminatory-treatment-after-capitol-protest-arrest.

Further news reports have caused concern that the prosecution of activists is influenced with political overtones. During his tenure as a U.S. Attorney, Patrick Fitzgerald targeted 23 activists, who were widely described as critics of U.S. foreign policy. *See* Peter Wallsten, *Activists cry foul over FBI probe*, The Washington Post (June 13, 2011), http://articles.washingtonpost.com/2011-06-13/politics/35235946_1_activists-cry-stephanie-weiner-targets ; Kevin Gosztola, *FBI Continues to Target Activists in Chicago and Minneapolis (VIDEO)*, Firedoglake (Dec. 9, 2010), http://my.firedoglake.com/kgosztola/2010/12/09/fbi-continues-to-target-activists-in-chicago-and-minneapolis/ ; Josh Gerstein, *After 1 year, FBI returns property to Minnesota anti-war activists*, Politico (Nov. 3, 2011), http://www.politico.com/blogs/joshgerstein/1111/FBI_returns_property_to_Minnesota_antiwar_activists.html.

The activist community and the public-at-large are unable to determine the nature and purpose of the prosecution of activists, because there is a lack of reliable information about the reasons the Department of Justice is prosecuting activists. Indeed, even Congress is left in the dark about the motivations behind the prosecution of activists. See, e.g., Kim Zetter, *Congress Demands Justice Department Explain Aaron Swartz Prosecution*, Wired (Jan. 29, 2013), http://www.wired.com/threatlevel/2013/01/doj-briefing-on-aaron-swartz/ ; Marcy Wheeler, *Aaron Swartz reveals the hypocrisy of our Justice Department*, Salon (Jan. 15, 2013), http://www.salon.com/2013/01/16/aaron_swartz_reveals_the_hypocrisy_of_our_justice_department/. And in respect of Lt. Choi, a magistrate judge had found that was indication that the Department of Justice was singling out Lt. Choi for "vindictively prosecution." *See* John Aravosis, *Judge finds prima facie evidence that US government may have "vindictively prosecuted" Dan Choi*, AMERICAblog (Aug. 31, 2011), http://americablog.com/2011/08/judge-finds-prima-facie-evidence-that-us-government-may-have-vindictively-prosecuted-dan-choi.html ; Scott Wooledge, *Updated: Judge Allows Lt Dan Choi's "vindictive prosecution" Defense*, Daily Kos (Aug. 31, 2011),http://www.dailykos.com/story/2011/08/31/1012290/-Updated-Judge-Allows-Lt-Dan-Choi-s-vindictive-prosecution-Defense# ; and Chris Geidner, *Government Files Motion to Stop "Vindictive Prosecution" Defense in Choi Trial*, Metro Weekley (Sept. 16, 2011), http://www.metroweekly.com/poliglot/2011/09/government-filed-motion-to-sto.html.

III. Application for Waiver or Limitation of Fees

I request a waiver of search, review, and duplication fees on the grounds that disclosure of the requested records is in the public interest, because it "is likely to contribute significantly to public understanding of operations or activities of the government and is not primarily in the commercial interest of the requester." 5 U.S.C. § 552(a)(4)(A)(iii) ; 22 C.F.R. 171.17(a) ; *see also* 28 C.F.R. § 16.11(k)(1) ; 32 C.F.R. § 286.28(d) ; 32 C.F.R. § 1900.13(b)(2).

As discussed above, numerous news accounts reflect the considerable public interest in the requested records and information. Given the ongoing and widespread media attention to this issue, the records and information sought in the instant Request will significantly contribute to public understanding of the operations and activities of the Department of Justice and the U.S. Attorney's Office with regard to the targeting of activists for prosecution. *See* 22 C.F.R. 171.17(a)(1) ; 28 C.F.R. § 16.11(k)(1)(i) ; 32 C.F.R. § 286.28(d) ; 32 C.F.R. § 1900.13(b)(2). Moreover, disclosure is not in the ACLU's commercial interest. Any information disclosed by me as a result of this Request will be available to the public at no cost. Thus, a fee waiver would fulfill Congress's legislative intent in amending FOIA. *See Judicial Watch Inc. v. Rossitti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003) ("Congress amended FOIA to ensure that it be 'liberally construed in favor of waivers for noncommercial requesters.'" (citation omitted)) ; OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524, § 2 (Dec. 31, 2007) (finding that "disclosure, not secrecy, is the dominant objective of the Act," but that "in practice, the Freedom of Information Act has not always lived up to the ideals of that Act").

I also request a waiver of search and review fees on the grounds that I qualify as a "representative of the news media," and the records and information are not sought for commercial use. 5 U.S.C. § 552(a)(4)(A)(ii) ; 28 C.F.R. § 16.11(d). Accordingly, fees associated with the processing of the Request should be "limited to reasonable standard charges for document duplication." 5 U.S.C. § 552(a)(4)(A)(ii)(II) ; *see also* 32 C.F.R. § 286.28(e)(7) ; 32 C.F.R. § 1900.13(i)(2) ; 22 C.F.R. 171.15(c) ; 28 C.F.R. § 16.11(d) (search and review fees shall not be charged to "representatives of the news media").

I meet the statutory and regulatory definitions of a "representative of the news media" because I function as an "entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience." 5 U.S.C. § 552(a)(4)(A)(ii).

* * *

Pursuant to applicable statute and regulations, I expect determination regarding expediting processing within 10 calendar days. *See* 5 U.S.C. § 552(a)(6)(E)(ii)(I) ; 22 C.F.R. 171.12(b) ; 28 C.F.R. § 16.5(d)(4) ; 32 C.F.R. § 286.4(d)(3) ; 32 C.F.R. § 1900.21(d).

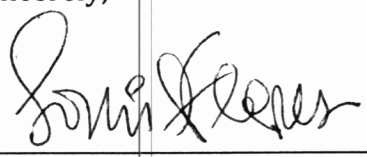
If the Request is denied in whole or in part, I ask that you justify all deletions by reference to specific exemptions to FOIA. We expect the release of all segregable portions of otherwise exempt material. We reserve the right to appeal a decision to withhold any information or to deny a waiver of fees.

Thank you for your prompt attention to this matter. Please furnish all applicable records to :

Louis Flores
70A Greenwich Ave., No. 342
New York, NY 10011

I affirm that the information provided supporting the request for expedited processing is true and correct to the best of my knowledge and belief.

Sincerely,



Louis Flores
70A Greenwich Ave., No. 342
New York, New York 10011
Tel : 1 (646) 400-1168
E-mail : louisflores@louisflores.com

Enclosures (as stated)

Exhibit A

From: "LF (g-Male)" <lflores22@gmail.com>
Subject: USA v. Lt. Daniel Choi - Blogger Inquiry/FOIL Request
Date: 27 mars 2013 20:25:45 UTC-04:00
To: Angela.George@usdoj.gov
Cc: Gilberto.Guerrero@usdoj.gov, mary.mccord@usdoj.gov, stratton.strand@usdoj.gov, roy.mcleese@usdoj.gov, Lori.Buckler@usdoj.gov, Victoria.Ashton@usdoj.gov, lflores22@gmail.com, press@ltdanchoi.org, tommysnews@gmail.com, Suzannah Beth <suzannahbethtroy@gmail.com>, danchoi2008@gmail.com

Dear Hon. Madame Prosecutor :

I am an LGBT blogger, based in New York City. I would like to update my latest blog post with information about the U.S. government's case against U.S. Army veteran, Lt. Daniel Choi.

http://ny-popculture-politics.blogspot.com/2013/03/lt-dan-choi-dadt-trial-update.html

Can you please answer the following questions, so that I can accurately report on my blog about the government's prosecution of Lt. Choi :

(i). Can you let me know why the DOJ is making its prosecution of Lt. Choi a priority ? Many activists question how the DOJ can put a priority on its prosecution of activists. For example, the DOJ faces criticism for its heavy-handed prosecution of Internet activist Aaron Swartz. Is the prosecution of Lt. Choi part of the same strategy to undermine the rights of activists ? Can you give me some color about this ? What is the DOJ trying to achieve with the prosecution of Lt. Choi, what is your purpose ?

(ii). One of the constant complaints that I've hear Lt. Choi make is that during the government's prosecution of Lt. Choi, he seems to not be being addressed by DOJ officials by his official rank, in accordance with AR 670-1. Is there any implied intention to express disrespect to LGBT Army veterans on the DOJ's part ? It would great to hear how the DOJ responds to Lt. Choi's complaints about this specific issue.

(iii) Can the DOJ disclose the cumulative cost of its prosecution of Lt. Choi ?

Thank you for any information you can provide. If I need to make an official FOIL request, please forward to me the necessary information so that I may submit a formal FOIL request. I look forward to your response.

Thank you kindly.

Best regards,

Louis Flores
lflores22@gmail.com
1 (646) 400-1168

Exhibit B

From: "LF (g-Male)" <lflores22@gmail.com>
Subject: Re: USA v. Lt. Daniel Choi - Blogger Inquiry/FOIL Request
Date: 10 avril 2013 21:47:14 UTC-04:00
To: Angela.George@usdoj.gov
Cc: Gilberto.Guerrero@usdoj.gov, mary.mccord@usdoj.gov, stratton.strand@usdoj.gov, roy.mcleese@usdoj.gov, Lori.Buckler@usdoj.gov, Victoria.Ashton@usdoj.gov, press@ltdanchoi.org, tommysnews@gmail.com, Suzannah Beth <suzannahbethtroy@gmail.com>, danchoi2008@gmail.com

Dear Hon. Madame Prosecutor :

I'm just following up on my request for information.

Looking forward to your response.

Thank you kindly.

Best regards,
-- Louis

On 27 mars 2013, at 20:25, LF (g-Male) wrote:

> Dear Hon. Madame Prosecutor :
>
> I am an LGBT blogger, based in New York City. I would like to update my latest blog post with information about the U.S. government's case against U.S. Army veteran, Lt. Daniel Choi.
>
> http://ny-popculture-politics.blogspot.com/2013/03/lt-dan-choi-dadt-trial-update.html
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>
> (iii) Can the DOJ disclose the cumulative cost of its prosecution of Lt. Choi ?
>
> Thank you for any information you can provide. If I need to make an official FOIL request, please forward to me the necessary information so that I may submit a formal FOIL request. I look forward to your response.
>
> Thank you kindly.
>
> Best regards.
>
> Louis Flores
> lflores22@gmail.com
> 1 (646) 400-1168

Exhibit C

From: "LF (g-Male)" <lflores22@gmail.com>
Subject: Fwd: USA v. Lt. Daniel Choi - Blogger Inquiry/FOIL Request
Date: 16 avril 2013 20:18:42 UTC-04:00
To: AskDOJ@usdoj.gov
Cc: Angela.George@usdoj.gov, Gilberto.Guerrero@usdoj.gov, mary.mccord@usdoj.gov, stratton.strand@usdoj.gov, roy.mcleese@usdoj.gov, Lori.Buckler@usdoj.gov, Victoria.Ashton@usdoj.gov, press@ltdanchoi.org, tommysnews@gmail.com, "Suzannah B. Troy" <suzannahbethtroy@gmail.com>, danchoi2008@gmail.com, lflores22@gmail.com

Ladies and Gentlemen :

I am a New York City-based blogger, and I have made requests for information from the Department of Justice. One of my requests was for the total cost of the Justice Department's prosecution against Lt. Daniel Choi stemming from his arrest on November 15, 2010, during a protest against the military's former policy known as "Don't Ask, Don't Tell."

I specifically mentioned in my original request, included in the e-mail chain below, for a response, or, alternatively, if there was a special process for submitting requests for information, I requested such information so that I could submit a formal request according to such process. In spite of this, I have received no acknowledgement or response to the requests for information submitted on two different occasions. See the e-mail chain included below.

According to the Attorney General's guidelines on the Freedom of Information Act, there is a presumption of "openness." See : http://www.justice.gov/ag/foia-memo-march2009.pdf

I would greatly appreciate it if you could route my request for this information to the appropriate department, so that I could receive an acknowledgement and an appropriate response to my requests for information.

Thank you kindly.

Best regards,

Louis Flores
1 (646) 400-1168
lflores22@gmail.com

Begin forwarded message:

> **From:** "LF (g-Male)" <lflores22@gmail.com>
> **Subject: Re: USA v. Lt. Daniel Choi - Blogger Inquiry/FOIL Request**
> **Date:** 10 avril 2013 21:47:14 UTC-04:00
> **To:** Angela.George@usdoj.gov
> **Cc:** Gilberto.Guerrero@usdoj.gov, mary.mccord@usdoj.gov, stratton.strand@usdoj.gov, roy.mcleese@usdoj.gov, Lori.Buckler@usdoj.gov, Victoria.Ashton@usdoj.gov, press@ltdanchoi.org, tommysnews@gmail.com, Suzannah Beth <suzannahbethtroy@gmail.com>, danchoi2008@gmail.com
>
> Dear Hon. Madame Prosecutor :
>
> I'm just following up on my request for information.
>
> Looking forward to your response.
>
> Thank you kindly.
>
> Best regards,
> -- Louis
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> > Dear Hon. Madame Prosecutor :
> >
> > I am an LGBT blogger, based in New York City. I would like to update my latest blog post with information about the U.S. government's case against U.S. Army veteran, Lt. Daniel Choi.

http://ny-popculture-politics.blogspot.com/2013/03/lt-dan-choi-dadt-trial-update.html

Can you please answer the following questions, so that I can accurately report on my blog about the government's prosecution of Lt. Choi :

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(iii) Can the DOJ disclose the cumulative cost of its prosecution of Lt. Choi ?

Thank you for any information you can provide. If I need to make an official FOIL request, please forward to me the necessary information so that I may submit a formal FOIL request. I look forward to your response.

Thank you kindly.

Best regards,

Louis Flores
lflores22@gmail.com
1 (646) 400-1168

Exhibit D

From: "Miller, William (USADC)" <William.Miller3@usdoj.gov>
Subject: Follow-up on your request
Date: 17 avril 2013 10:32:51 UTC-04:00
To: "lflores22@gmail.com" <lflores22@gmail.com>

Mr. Flores: Thank you for your request for information concerning the case involving Daniel Choi.

A FOIA request for records from a U.S. Attorney's Office should be sent to the Department of Justice's Executive Office for United States Attorneys (EOUSA).
EOUSA is the official record keeper for the records maintained in all United States Attorneys' offices, and will respond to your request directly

The address is as follows:

Department of Justice
EOUSA/FOIA/PA Staff
BICN Bldg.
600 E Street, N.W., Suite 7300
Washington, D.C. 20530-0001

The telephone number is (202) 252-6020.

Bill Miller
Public Information Officer
U.S. Attorney's Office for the District of Columbia
202-252-6643 (Direct)
202-252-6933 (Main)
william.miller3@usdoj.gov

SENDER: COMPLETE THIS SECTION

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

Department of Justice
EOUSA/FOIA/PA staff
BICN Bldg.
600 E. Street, NW, Ste. 7300
Washington, DC 20530-0001

COMPLETE THIS SECTION ON DELIVERY

A. Signature
X ☐ Agent ☐ Addressee

B. Received by (Printed Name) C. Date of Delivery

D. Is delivery address different from item 1? ☐ Yes
If YES, enter delivery address below: ☐ No

3. Service Type
☒ Certified Mail ☐ Express Mail
☐ Registered ☒ Return Receipt for Merchandise
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4. Restricted Delivery? (Extra Fee) ☐ Yes

2. Article Number (Transfer from service label) 7013 0600 0000 6551 0398

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City, State, ZIP+4 600 E Street NW, #7300 wash DC 20530-0001

PS Form 3800, August 2006 See Reverse for Instructions

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New York, NY 10011

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- NO INSURANCE COVERAGE IS PROVIDED with Certified Mail. For valuables, please consider Insured or Registered Mail.
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- For an additional fee, delivery may be restricted to the addressee or addressee's authorized agent. Advise the clerk or mark the mailpiece with the endorsement *"Restricted Delivery"*.
- If a postmark on the Certified Mail receipt is desired, please present the article at the post office for postmarking. If a postmark on the Certified Mail receipt is not needed, detach and affix label with postage and mail.

IMPORTANT: Save this receipt and present it when making an inquiry.

PS Form 3800, August 2006 *(Reverse)* PSN 7530-02-000-9047

Louis Flores
704 Greenwich Ave., No. 342
New York, NY 10011

Via Certified Mail
Return Receipt Requested

Department of Justice
EOUSA / FOIA / PA Staff
BICN Bldg.
600 E. Street, N.W., Suite 7300,
Washington, D.C. 20530-0001.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

LOUIS FLORES,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF JUSTICE,

Defendant.

Civil Action No. 15-CV-2627

(Gleeson, J.)
(Mann, M.J.)

DECLARATION OF ASSISTANT U.S. ATTORNEY RUKHSANAH L. SINGH

I, RUKHSANAH L. SINGH, declare as follows:

1. I am the Assistant United States Attorney for the Eastern District of New York with primary responsibility for the litigation of this Action. As such, I am familiar with the files and materials that this office maintains concerning this litigation.

2. This declaration and the exhibits annexed hereto submitted in support of Defendant's Motion for Summary Judgment are true copies of documents in the files of the Office of the United States Attorney for the Eastern District of New York.

3. Attached hereto as Exhibit A is a true and correct copy of a letter dated April 30, 2013 from Plaintiff Louis Flores ("Plaintiff") to "EOUSA/FOIA/PA," with enclosures thereto.

4. Attached hereto as Exhibit B is a true and correct copy of an email dated March 27, 2013 from Plaintiff to an Assistant United States Attorney ("AUSA") at the United States Attorney's Office in the District of Columbia ("USAO-DC"), with copy to other email accounts.

5. Attached hereto as Exhibit C is a true and correct copy of an email dated April 10, 2013 from Plaintiff to the USAO-DC AUSA, with copy to other email accounts.

6. Attached hereto as Exhibit D is a true and correct copy of an email dated April 16, 2013 from Plaintiff to an ASKDOJ email account, with copy to other email accounts.

7. Attached hereto as Exhibit E is a true and correct copy of an email dated April 17, 2013 from the Public Information Officer at USAO-DC to Plaintiff.

8. Attached hereto as Exhibit F is a true and correct copy of an email dated April 30, 2013 from Plaintiff to the Public Information Officer at USAO-DC, with copy to other email accounts and without attachment thereto.

9. Attached hereto as Exhibit G is a true and correct copy of a letter dated December 6, 2013 from Thomas H. Golden of Willkie Farr & Gallagher LLP ("Willkie Farr") to the Office of Information Policy ("OIP").

10. Attached hereto as Exhibit H is a true and correct copy of a letter dated May 20, 2014 from OIP to Arthur Biller of Willkie Farr, with attachment thereto.

11. Attached hereto as Exhibit I is a true and correct copy of a letter dated August 17, 2015 from the Executive Office for United States Attorneys ("EOUSA"), Freedom of Information & Privacy Staff, to Plaintiff, without enclosures thereto.

12. Attached hereto as Exhibit J is a true and correct copy a document entitled "Plaintiff's Index to References to Records Requested under FOIA Request," provided by Plaintiff to the undersigned on September 16, 2015.

13. Attached hereto as Exhibit K is a true and correct copy of a letter dated October 13, 2015 from the undersigned to Plaintiff, without enclosures thereto.

14. Attached hereto as Exhibit L is a true and correct copy of a letter dated October 15, 2015 from the undersigned to Plaintiff.

15. Attached hereto as Exhibit M is a true and correct copy of a letter dated October 26, 2015 from Plaintiff to the undersigned, with enclosures thereto.

16. Attached hereto as Exhibit N is a true and correct copy of a letter dated November 3, 2015 from the undersigned to Plaintiff.

In accordance with 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief. Executed on November 23, 2015 (Brooklyn, New York).

*s/Rukhsanah L. Singh*_____
RUKHSANAH L. SINGH
Assistant United States Attorney

EXHIBIT F

From: LF (g-Male) [mailto:lflores22@gmail.com]
Sent: Tuesday, April 30, 2013 9:24 PM
To: Miller, William (USADC)
Cc: ASKDOJ (JMD); George, Angela (USADC); Guerrero, Gilberto (USADC); McCord, Mary (USADC); Strand, Stratton (USADC); roy.mcleese@usdoj.gov; Buckler, Lori (USADC); Ashton, Victoria (USADC); press@ltdanchoi.org; tommysnews@gmail.com; lflores22@gmail.com; Louis Flores
Subject: USA v. Lt. Daniel Choi - FOIA Request

Dear Mr. Miller :

I have submitted my FOIA request today by certified mail, return receipt requested.

Attached is a courtesy copy of a .pdf scan of my request. It is modeled on a request submitted by the ACLU, so I reference many regulations.

Note my requests for expedited processing and my application for waiver or limitation of fees.

If you have any questions, please feel free to contact me.

Thank you kindly.

Louis Flores
lflores22@gmail.com
louisflores@louisflores.com
1 (646) 400-1168

On 17 avr. 2013, at 10:32, Miller, William (USADC) wrote:

Mr. Flores: Thank you for your request for information concerning the case involving Daniel Choi.

A FOIA request for records from a U.S. Attorney's Office should be sent to the Department of Justice's Executive Office for United States Attorneys (EOUSA).
EOUSA is the official record keeper for the records maintained in all United States Attorneys' offices, and will respond to your request directly

The address is as follows:

Department of Justice
EOUSA/FOIA/PA Staff
BICN Bldg.

600 E Street, N.W., Suite 7300
Washington, D.C. 20530-0001

The telephone number is (202) 252-6020.

Bill Miller
Public Information Officer
U.S. Attorney's Office for the District of Columbia
202-252-6643 (Direct)
202-252-6933 (Main)
william.miller3@usdoj.gov

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

LOUIS FLORES, Plaintiff, v. UNITED STATES DEPARTMENT OF JUSTICE, Defendant.	CIVIL ACTION NO. 15-CV-2627 (Gleeson, J.) (Mann, M.J.)

DECLARATION OF KARIN KELLY

I, Karin Kelly, hereby declare as follows:

1. I am a Paralegal Specialist and Freedom of Information Act ("FOIA") Coordinator in the Civil Division of the United States Attorney's Office for the District of Columbia. ("USAO-DC"). My responsibilities include serving as a liaison to the Freedom of Information Act and Privacy Act staff ("FOIA/PA staff") in the Executive Office for United States Attorneys ("EOUSA"). EOUSA FOIA/PA staff, in accordance with 28 C.F.R. § 16.3, processes and responds to all FOIA/PA requests for all 94 United States Attorney's Offices, including USAO-DC.

2. The statements I make in this declaration are made on the basis of my search for official files and records of the USAO-DC and my personal knowledge, including knowledge acquired by me through the performance of my official duties.

3. The purpose of this declaration is to provide the Court with information regarding efforts to respond to the FOIA request dated April 30, 2013 from Plaintiff Louis Flores ("Plaintiff"), FOIA Request No. 2015-02422, including (I) relevant correspondence related to

Plaintiff's FOIA request; and (II) an explanation of the search for records responsive to the Plaintiff's request.

I. CORRESPONDENCE

5. On June 2, 2015, EOUSA FOIA/PA staff informed me that FOIA Request No. 2015-02422 was in litigation and involved documents that were likely located in the USAO-DC, and provided me with a copy of the FOIA Request.

6. I reviewed the Request and determined that Mr. Flores was seeking information related to the: (A) United States Department of Justice's ("DOJ's") prosecution of "activists"; (B) DOJ's alleged failure to address Daniel Choi ("Choi") by his military rank; and (C) costs associated with the arrest and prosecution Choi.

7. I commenced the search to find any information responsive to Plaintiff's Request that might be located in USAO-DC.

II. THE SEARCH FOR ANY RESPONSIVE RECORDS

8. I have diligently made inquiries of all individuals who have access to systems of records located within the USAO-DC that were likely to contain records responsive to Plaintiff's request and, to the extent feasible, those systems have been searched. The inquiries were reasonably calculated to likely uncover all records responsive to Plaintiff's request. Based upon those inquiries, I was unable to locate any records responsive to Plaintiff's FOIA Request.

9. I am not aware of any other locations within USAO-DC where any other records that might be responsive to Plaintiff's Request are likely to be located. I am not aware of any other method or means by which a further search could be conducted other than as identified above.

A. Prosecution of Activist (Plaintiff's Request - Items 1 and 2)

10. To determine if USAO-DC maintained any records responsive to items 1 and 2 in Plaintiff's FOIA Request, I first contacted a USAO-DC IT Specialist in the Applications and Information group. The IT Specialist has access to the Replicated Criminal Information System ("RCIS") database and is able to conduct searches and generate reports of information requested on that database. RCIS is an electronic tracking database system designed to provide users with information related to, among other things, court cases, arrests, and witness data from cases originating in the Superior Court of the District of Columbia.

11. Via email, I informed the RCIS IT Specialist that this office had received a FOIA request seeking information concerning the number of "activists" that had been "targeted for prosecution". I asked the RCIS IT Specialist whether this office, through RCIS, had the capability to track that type of information. I pointed out that the requester did not specify a time period in which to frame the search. I quoted the relevant portion of the Request in the email to the RCIS IT Specialist so that she was aware of the full extent of the Request.

12. The RCIS IT Specialist responded to me by email that USAO-DC does not use the term "activist" to categorize an individual, and the term "targeted" is not defined. Because of this, a search could not be conducted using those terms. The RCIS IT Specialist suggested that I contact another IT professional who would be able to access data for federal prosecutions.

13. I then contacted an IT Specialist in the Applications and Information ("AI") group at USAO-DC, via email. I explained to the AI IT Specialist the type of information Plaintiff was seeking and asked if a similar search of the Legal Information Network System ("LIONS") could be performed. LIONS is a case management system used by the Criminal, Appellate and Civil

Divisions of USAO-DC to track all activities taking place in the district court matters, cases, and appeals.

14. The AI IT Specialist explained that "activist" is not a term that can readily be tracked in LIONS. The AI IT Specialist pointed out that the only way the term "activist" could be tracked in the database is if it had been manually entered into the comment section of an entry for a particular matter, case, or appeal.

15. Nevertheless, the AI IT Specialist conducted a search using the term "activists" in LIONS. The search produced no results.

16. I next contacted the Assistant United States Attorney ("AUSA") who was assigned to the Choi case. The AUSA pointed out that the term "activist" is not used by the USAO-DC. Because the term is not used or defined, it could not be used to search for records responsive to any part of the FOIA Request pertaining to "activists."

17. The AUSA also pointed out that USAO-DC does not specifically target anyone, or anything, for prosecution. Because USAO-DC does not maintain records in a format that identifies "targeted" or "target" as searchable terms, those terms could not be used to search for records responsive to any part of the FOIA Request.

18. With regard to any rules, procedures or guidelines being sought through the FOIA request, (*see* Request No. 1.C.), the AUSA advised that she did not have a manual to refer to regarding prosecution of "activists".

19. In item 2B, Plaintiff sought information related to "the limits of DOJ's prosecution to minimi[z]e the interference with First Amendment, other Constitutional rights, civil liberties, and other civil rights of Lt. Choi." Due to the broad and vague description, it is

difficult to ascertain exactly which records are being sought by Plaintiff. Consequently, I was unable to formulate a search for records related to item 2B.

B. DOJ's Alleged Failure to Address Choi by His Military Rank (Plaintiff's Request - Item 3)

20. I was unable to search for records responsive to item 3 of Plaintiff's Request because Plaintiff appears to be seeking a response to a question.

C. Costs Associated with the Choi Case (Plaintiff's Request – Item 4)

21. To determine if USAO-DC maintained any records responsive to item 4 in Plaintiff's FOIA Request, I contacted the USAO-DC Budget Officer ("Budget Officer") via email. I provided the Budget Officer the relevant portion of the FOIA Request seeking the costs associated with the Choi prosecution.

22. The Budget Officer explained to me that the accounting system used by USAO-DC does not record costs associated with a particular case by defendant name or on a defendant-by-defendant basis where multiple defendants are prosecuted in one case. Thus, any search to ascertain costs associated with a particular defendant would need to be conducted by searching the individual requests made by any AUSA or staff assigned to the case, taking out budget requests for other cases that those individuals worked on during the selected time frame, and somehow attempting to ascertain what costs may be attributed to the one defendant, as opposed to a co-defendant or the overall case. Some examples of requests made by an AUSA or staff member that would result in costs covered by the USAO-DC would include requests for transcripts of a proceeding or fees associated with an expert witness. If an AUSA or staff member made numerous requests in various cases, sorting through resulting accounting documents would have to be done manually.

23. As a result, accounting records do not exist for a single defendant when there are multiple co-defendants, nor are there records as to an individual defendant's "share" of the overall cost of prosecuting the multi-defendant case.

24. It is, thus, not possible to segregate the accounting documents for a single defendant when there are multiple co-defendants or to otherwise ascertain a defendant's "share" of the overall cost of prosecuting the multi-defendant case.

III. SEARCH FOR PUBLICLY AVAILABLE RECORDS

25. At the request of EOUSA, I conducted a search for publicly available information related the Daniel Choi case that was available in USAO-DC files.

26. I located publicly-available documents in USAO-DC files, most of which are also available on PACER.

27. The located publicly-available documents were not the full set of documents available on PACER in connection with the prosecution of Daniel Choi.

28. After locating this information, I electronically scanned the records into AccessPro database system for review by EOUSA FOIA/PA staff. AccessPro is an automated database system designed to coordinate every aspect of USAO's FOIA and PA requests processing.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 30th day of September, 2015.

Karin B. Kelly
Paralegal Specialist
FOIA Coordinator
United States Attorney's Office for
the District of Columbia

Louis Flores
34-21 77th Street, No. 406
Jackson Heights, NY 11372

Supreme Court of the State of New York
Appellate Division : 2d Judicial Dept.
Grievance Committee
Renaissance Plaza
335 Adams Street, Suite 2400
Brooklyn, NY 11201-3745

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(USPS Tracking #)		
(9505 5152 5421 7062 0532 83)		
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(Up to $50.00 included)		
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(Saturday 03/04/2017)		
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Insurance	1	$0.00
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Total		$14.25
Debit Card Remit'd		$14.25
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